No. 23

In the Supreme Court of the United States

OCTOBER TERM, 1941

THE UNITED STATES OF AMERICA, AS GUARDIAN OF THE INDIANS OF THE TRIBE OF HUALPAI IN THE STATE OF ARIZONA, PETITIONER

v.

SANTA FE PACIFIC RAILROAD COMPANY, A CORPORATION, RESPONDENT

BRIEF FOR THE UNITED STATES

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v.

SANTA FE PACIFIC RAILROAD COMPANY, A CORPORATION, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

I

The opinion of the Circuit Court of Appeals is reported in 114 F. (2d) 420 (C. C. A. 9th, 1940) and also appears in the record at pages 204 to 213. The "Supplemental Order and Opinion" of the District Court has not been reported. It is in the record at pages 191 to 196.

JURISDICTION

This suit was brought in the United States District Court for the District of Arizona by the

rights. As Chief Justice Marshall first declared in *Johnson v. McIntosh*, 8 *Wheat.* 543 (1823):

> These grants have been understood by all to convey a title to the grantees, subject only to the Indian right of occupancy. (*At* p. 574).[1]

The primary issue in this case, therefore, is whether the *Walapai* Indians had an enforceable right of use and occupancy in those lands which, on July 27, 1866, they had occupied continuously from time immemorial. The question of *what* lands, if any, the *Walapai* Tribe so occupied is a question of fact not raised by this appeal. For the purpose of establishing, on this appeal, the legal sufficiency of the complaint, it must be assumed that there *was* some such land. *Whether* or not such land actually embraced the entire acreage asserted in the complaint is immaterial at this stage of proceedings.

> B. This Court has continuously recognized that aboriginal possession creates a possessory right legally enforceable against everyone except the United States.

The protection of aboriginal possession has often been referred to as a matter of national policy. This is a half truth, misleading if policy is contrasted *with law*. The fact is that the exist-

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[1] See, in accord, *Worcester v. Georgia*, 6 Pet. 515, 546 (1832); *Beecher v. Wetherby*, 95 U. S. 517, 525 (1877); *Holden v. Joy*, 17 How. 211, 239 (1855).

occupancy had been recognized by treaty, statute, or otherwise. *Johnson v. McIntosh*, 8 Wheat. 543 (1823); *United States v. Shoshone Tribe*, 304 U. S. 111 (1938). The provision quoted, like the act itself, applied within a roughly located area from Missouri to the Pacific coast and the term "Indian title" applied equally to all lands within that area and hence to all Indian rights of occupancy which then existed within that area. The provision had the same meaning and application with respect to lands in the Mexican Cession area as with respect to any other lands. *United States v. Candelaria*, 271 U. S. 432 (1926). This does not mean that it created a right of occupancy either in the Walapai Tribe or in any other tribe, if such right was not already in existence, or even that it recognized the actual existence of such a right in the Walapai Tribe. It does mean that if the Walapai Tribe had a right of occupancy at the time the statute was enacted, that right was preserved and safeguarded until extinguished by the United States in conformity with the provisions of the act. *Buttz v. Northern Pacific Railroad*, 119 U. S. 55 (1886).

The protection afforded by the 1866 act to existing Indian rights of use and occupancy based on immemorial possession was not something new in American law. This Court has consistently held that in the absence of express language to the contrary, a Federal grant of public lands does not constitute an extinguishment of Indian occupancy

ARGUMENT

POINT I

WITH RESPECT TO LANDS WHICH THE WALAPAI TRIBE OF JULY 27, 1866 HAD CONTINUOUSLY OCCUPIED FROM TIME IMMEMORIAL, THE TRIBE ENJOYED A RIGHT OF OCCUPANCY, SAFEGUARDED BY THE RAILROAD GRANT ACT OF THAT DATE.

1. The act of 1866 safeguarded whatever rights of occupancy the Walapai Tribe enjoyed at the time of its enactment.

Section 2 of the act of July 27, 1866 (14 Stat. 292) (Appendix I, G) provides:

> The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession, the Indian title to all lands falling under the operation of this act and acquired in the donation to the road named in the act.

By the foregoing provision, Congress necessarily indicated (a) that the existence of Indian title in certain lands was not to exclude those lands from the "donation to the road named in the act"; and (b) that as to such lands Indian title was to continue until extinguished, the United States assuming a duty to extinguish such Indian title "as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession."

The term "Indian title" had a well understood meaning. It connoted the Indian possessory right based on aboriginal occupancy, whether or not that

lands quitclaimed within the reservation is to stand, it is doubtful whether, under existing law, the United States may legally continue to treat the quitclaimed area as a part of the Walapai reservation. (See act of May 25, 1918, 40 Stat. 561, 570, 25 U. S. C. 211.) The foregoing considerations were advanced by petitioner in answer to the argument of the respondent, opposing the granting of certiorari, that the execution of the quitclaim has eliminated the first cause of action or rendered it unimportant.

SPECIFICATION OF ERRORS TO BE URGED

1. That the courts below erred in holding that the Walapai Tribe on July 27, 1869, did not enjoy a right of occupancy, safeguarded by the Railroad Grant Act of that date, with respect to lands which the tribe had continuously occupied from time immemorial.

2. That the courts below erred in holding that any rights of the Walapai Tribe that may have existed on July 27, 1869, have been extinguished since that date by the United States or abandoned by the Walapai Tribe.

3. That the courts below erred in depriving the United States and the Walapai Tribe of the right to a trial of the facts to determine whether and to what extent the Walapai Tribe of Indians have continuously occupied and possessed the lands described in the complaint.

dated January 23, 1941, whereby the respondent quitclaimed to the United States all the lands to which the first cause of action relates. These are lands inside the Walapai Reservation, in contrast to those outside the reservation which are covered by the second cause of action. Respondent executed this quitclaim in order to obtain certain benefits under the Transportation Act of September 18, 1940 (54 Stat. 879), which were conditioned upon the release of its claim to unpatented lands of any kind. The lands claimed by the railroad within the reservation had never been patented to it and the quitclaim was limited to those unpatented lands.

This quitclaim has no relevance to the merits of the pending action. It obviously has nothing whatever to do with the lands covered by the second cause of action. Nor can it have any bearing upon the right of the Indians to an accounting under the first cause of action. "for all rents, issues, and profits derived from the leasing, renting or use of lands subject to such right of occupancy by such Hualapai Tribe." (R. 20). Moreover, the quitclaim of reservation lands to the United States did not give the Government or the Walapai Tribe the primary relief sought in the case at bar, i. e., an adjudication that the tribe has "a right of occupancy and use" in those lands. If the decision of the courts below that the Walapai Indians have no right of occupancy in the

had concluded that the facts alleged in the complaint did not make out a cause of action.

The Circuit Court of Appeals affirmed the dismissal of the complaint without entering up the essential findings in the District Court's order. Without referring expressly to the conflicting positions of counsel, the Circuit Court purported to take judicial notice of the falsity of allegations in the complaint asserting continuous Indian possession of the lands in controversy. The appellate court also assumed as a fact, contrary to the allegations in the complaint (R. 4, 8, 9, 15, 16), that possession of the lands claimed in this suit had been abandoned and that the tribe had removed, or been removed from, the area now claimed (R. 211).

In petitioning for certiorari, therefore, and in the present brief, the Government has been compelled to consider both possible interpretations of the action taken in the courts below: (a) that the complaint was dismissed on the ground that the facts alleged therein failed to state a cause of action, and (b) that the complaint was dismissed on the ground that essential allegations of fact contained therein were found by the court to be false. Points 1 and 2 of the argument in this brief will be addressed to the first alternative, and Point 3 to the second.

Subsequent to the filing of the petition for certiorari, the Government received an indication

On this state of the record, confusion inevitably resulted, on the appeal taken from the order dismissing the complaint, as to just what the District Court had decided or purported to decide. The railroad sought to treat the decision as one disposing of the case on the merits and to rely on the "findings" as if they were findings of fact made by an equity court on a trial of the facts after issue reached. The Government, on the other hand, insisted that the court could not properly and had not actually decided any questions of fact and that the "Supplemental Order and Opinion" merely explained the reasoning on which the court

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definable territory and no place or places for any great length of time." (R. 30, 192.)

and various evidentiary supporting materials indicating generally that certain explorers reported these Indians "subsisting on wild foods and dressing in skins" and that various travelers reported seeing Indians other than *Walapai* within the area claimed in this suit (R. 30–33, 192). A similar instance as to mixed fact and law is supplied by the court's "finding" concerning the extinguishment of the Indian possessory right, if any, to the lands in controversy (R. 67–73, 194–195). An important instance as to a pure question of law is supplied by the court's "finding" as to Mexican and Spanish law, based for the most part on the arguments later unsuccessfully pressed on this Court on behalf of other parties in another suit (*Pueblo of Santa Rosa* v. *Fall*, 273 U. S. 315 (1927)) (R. 145–189)).

The respondent's memorandum and other materials which have been injected into the present record also deal in considerable measure with issues never properly involved in the case at bar (e. g., rights of the Indians as against the United States) and with questions which have been eliminated by the election of the government hereinabove referred to.

"Memorandum of Points and Authorities" and brief filed in support of the motion. These were, in express terms, made a part of the "Supplemental Order" and, on respondent's designation (R. 203), have been incorporated into the record.

The materials thus injected into the case consist of a heterogeneous collection of legal arguments by the railroad's attorneys in this case and by attorneys for other parties in another case, factual assertions, hearsay statements, crude privately prepared maps, official and nonofficial reports, and unassorted miscellaneous papers and documents. Here and there, these materials bear on pure questions of fact and (and in varying degrees to dispute the truth of allegations of fact contained in the complaint; to a considerable extent they deal in a similar way with mixed questions of law and fact; and in large measure they are mere arguments on questions of law.[4]

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[4] The materials included in the record consist of (a) the entire 38-page "Memorandum" (R. 25–63). (b) its 10 supplementary appendices (R. 83–132). (c) fragmentary excerpts (R. 133–145) from respondent's 133-page printed brief in support of the motion to dismiss, (d) much longer excerpts from a brief in another case between other parties (R. 145–159), and (e) excerpts from the "Appendix" to this latter brief (R. 159–183).

[5] Thus, the first "finding" quoted above was based on, and incorporated by reference, the railroad's own assertion that—

"The *Wabash* were disunited bands of nonagricultural, nomadic savages, who occupied exclusively to

land in controversy under the laws of Spain and Mexico" (R. 192).

(b) "For plaintiff to prevail, it must show some act of the legislative or executive departments of the government creating some right in the Walapai Indians superior to the rights of defendant under the Granting Act" (R. 192).

(c) This has not been shown. For courts, "the sources and authorities cited by defendant * * * show beyond possibility of challenge * * * that it was not the policy of the United States to accord these Indians any possessory or other rights because of any alleged occupancy claim" (R. 192–193).

(d) If the Indians had had any rights, "there is no doubt that they were extinguished by acts of Congress and lawful acts of the executive * * *" (R. 191).

(e) "The controlling elements of this case namely, the laws of Spain and Mexico, the Legislation of Congress, and the course of administration, are matters of judicial knowledge. * * * No evidence upon the issues plaintiff desires to prove would enable plaintiff to escape the controlling effect of public law and public administration, which the Court judicially knows, which cannot be controverted by evidence and which requires dismissal of the case" (R. 195–196).

In support of these and related "findings" and to indicate the source of its judicial knowledge, the court referred to various portions of the

the manner specifically provided for in the granting act. While the Government relied on both alternatives in the District Court, it made a definite election in the Circuit Court of Appeals in favor of the latter and will take the same position here. There also was a third alternative basis of action on which the Government relied in the District Court. This related exclusively to lands inside the reservation and was based on the special allegations, in paragraph 13 of the complaint (R. 9), setting forth a recognition of title by adverse possession. This was not pressed in the Circuit Court of Appeals and will not be argued on the merits here.

The railroad moved to dismiss the complaint (R. 24–26), explaining in a supporting "Memorandum of Points and Authorities" that—

> The basic theory of this motion is that, to the knowledge of the Court, the complaint states no cause of action. [R. 28.]

The District Court granted the motion (R. 190) and later filed a "Supplemental Order and Opinion" (R. 191–196) to reveal the "conclusions" upon which the order dismissing the complaint had been based. The supplemental order contained a series of "findings," the more important of which are:

> (a) "The Walapai were of the savage tribes referred to in the Treaty of Guadalupe Hidalgo" and "had no rights to the

versy. The relief prayed for included, among other things, a request for an accounting for rents, issues, and profits and a request "that any and all right, title, or interest claimed or asserted by" the railroad "be adjudged and decreed to be null and void, or, if found valid, be adjudged and decreed to be subject to the continued right of occupancy and use by" the *Walapai* Tribe (R. 20).

This request in the alternative reflected the two alternative theories or grounds on which the Government originally sought to sustain its right to maintain this suit and which applied equally to all the lands in controversy. These theories were predicated on alternative interpretations of the 1866 granting act and of its effect on lands that were subject, at the time of the grant, to a valid Indian claim of immemorial use and occupancy. Under one interpretation, the Indian right of use and occupancy was relied on as having prevented the lands in question from being public lands to which "the United States have full title * * * free from preemption or other claims or rights" and hence as having excluded the lands from the grant altogether. Under the other interpretation, the special provisions in section 2 of the granting act, specifying how "Indian title * * * acquired in the donation to the road named in the act" is to be extinguished, are taken to indicate that title did pass from the United States to the railroad under the grant, but that it did so subject to the rights of the Indians until extinguished in

their ancestral home long before as well as ever since the act of July 27, 1866 (R. 7, 8, 9, 14, 15, 16). One segment of this line is inside the boundaries of a reservation established for the Walapai Indians by the duly constituted authorities of the United States Army on July 8, 1881, and continued by Executive Order of January 4, 1883 (1 Kappler 804) (R. 4–7). Another part of the railroad right of-way passes through Walapai ancestral lands which lie outside this reservation (R. 10–16). No patents have ever been issued to the railroad as to any of the lands inside the reservation which are claimed by it under the 1866 act. As to lands outside the reservation, a series of similar United States patents were issued to the railroad which cover in the aggregate all the alternate, odd-numbered sections of land on both sides of the railroad line within the limits specified in the 1866 act (R. 18, 19, 29).

The present suit has been brought by the United States, as guardian of the Indians, to establish judicially that the railroad's rights under the grant are subject to the Indians' right of occupancy in their ancestral lands both inside and outside their present reservation. The bill of complaint consists of one group of allegations relating to lands inside the reservation (R. 2–10), of another group, designated as a "Second Cause of Action" (R. 10–19), relating to lands outside the reservation, followed by a common prayer for relief equally applicable for the most part to all the lands in contro-

is invoked under section 240 (a) of the Judicial Code, as amended, 28 U. S. C. sec. 347 (a).

STATEMENT

By act of July 27, 1866 (14 Stat. 292), Congress granted to respondent's predecessor in title a right-of-way over the "public domain" for the construction of a railroad and telegraph line (sec. 2, 14 Stat. 294) from Springfield, Missouri, to the Pacific Coast (sec. 1). The act included in addition a grant of the odd-numbered sections of public land within specified limits on each side of the railroad

> * * * whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption or other claims or rights. * * * [Sec. 3.]

The act provided:

> The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession, the Indian title to all lands falling under the operation of this act and acquired in the donation to the road named in the act. [Sec. 2.]

On March 12, 1872, the railroad definitely located its line along a route passing in northwestern Arizona across lands with respect to which, it is alleged in the bill of complaint, the Indians of the Walapai Tribe have asserted an exclusive right of occupancy and which they actually have occupied as part of

United States in its own right and as guardian of the Indians of the *Walapai*[1] Tribe in Arizona to enjoin respondent from interfering with the possession and occupancy by the Indians of certain lands in northwestern Arizona (R. 2, 19–21, 29). The respondent, a corporation organized under the act of March 3, 1897 (29 Stat. 622), and doing business in the State of Arizona (R. 3), claims full and unrestricted title to the lands in question under the grant to its predecessor, the Atlantic and Pacific Railroad, provided for in the act of July 27, 1866 (14 Stat. 292) (R. 7, 15, 29). Jurisdiction of the District Court, invoked under section 24 of the Judicial Code, as amended, 28 U. S. C. sec. 41 (1), has not been challenged.

The suit did not come to issue or trial in the District Court, but was dismissed, on respondent's motion, on the ground that, to the knowledge of the court, the bill of complaint failed to state a cause of action (R. 190, 196). On an appeal (R. 196), taken under section 128 of the Judicial Code, as amended, 28 U. S. C. sec. 225 (a), the United States Circuit Court of Appeals for the Ninth Circuit affirmed the order of dismissal. A petition for a writ of certiorari, filed in this Court by the United States, was granted on March 10, 1941 (R. 217). Jurisdiction now to review the final decree of affirmance entered in the Circuit Court of Appeals

[1] This spelling, used by the courts below, will be adopted throughout this brief.

ence, nature, and incidents of this governmental policy of protecting aboriginal occupancy have already been established by, and are embodied in, a long series of Federal statutes and decisions of this Court.

A review of these statutes and decisions will show that continuous occupancy of a defined area from time immemorial creates a legally enforceable possessory right, valid against all parties other than the United States itself, which alone has power to extinguish this possessory right. Legislative definition of this possessory right may be traced from the first act of the United States on this subject in 1783 to current provisions of the United States Code. Judicial recognition of this right has been consistent from the classic opinion written by Chief Justice Marshall in *Johnson* v. *McIntosh,* 8 Wheat. 543 (1823), to the most recent formulation of the principle in *United States* v. *Shoshone Tribe,* 304 U. S. 111 (1938).

This uniform course of congressional legislation and judicial decision makes it clear that the right of an Indian tribe in lands continuously occupied from time immemorial to protection against all claimants other than the United States is not a right which depends upon the geographical location of the tribe or upon the political history under prior sovereignties of the lands so occupied. That such aboriginal occupancy is entitled to judicial protection against all parties other than the United States has now become an

established rule of Federal law. The legal right thus conferred upon an Indian tribe does not require amplification by proof of similar right under any prior sovereignty nor by proof that the right which the law allows has always in fact been respected by administrative officials or third parties.

The rule recognizing possessory rights by reason of aboriginal occupancy is a general one applicable to any Indian tribe situated anywhere within the United States. The rule was established on grounds equally applicable to all tribes and to all parts of the United States. The rule has never been limited by this Court to the particular tribes or areas that happened to be involved in particular cases.

To demonstrate the truth of the foregoing assertion requires an analysis of the decisions recognizing the right in question. The rule was first enunciated by Chief Justice Marshall in *Johnson* v. *McIntosh*, 8 Wheat. 543 (1823). The following brief excerpts from his opinion set forth in clear terms the legal status of Indian possessory rights based upon aboriginal occupancy:

> * * * The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same

object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.

* * * * *

* * * the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, *with a legal as well as just claim to retain possession of it, and to use it according to their own discretion;* but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle that discovery gave exclusive title to those who made it.

While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in posses-

> sion of the natives. These grants have been understood by all to convey a title to the grantees, subject only to the Indian right of occupancy. (At pp. 572–574.) [Italics supplied.]

This Court has had frequent occasion to reconsider this rule and on each occasion has reaffirmed it. In the famous case of *Worcester* v. *Georgia*, 6 Pet. 515 (1832), this Court, *per* Marshall, *C. J.*, after pointing out that "the great maritime powers of Europe" had agreed upon the principle set forth in the *McIntosh* case, went on to expound that principle in the following terms:

> This principle, acknowledged by all Europeans, because it was the interest of all to acknowledge it, gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and of making settlements on it. It was an exclusive principle which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell (at p. 544).

Again in *Mitchel* v. *United States*, 9 Pet. 711 (1835), this Court declared:

> * * * One uniform rule seems to have prevailed from their first settlement, as appears by their laws; that friendly Indians were protected in the possession of the lands they occupied, and were considered as owning them by a perpetual right of possession in the tribe or nation inhabiting them, as their common property, from generation to generation, not as the right of the individuals located on particular spots.
>
> Subject to this right of possession, the ultimate fee was in the crown and its grantees, which could be granted by the crown or colonial legislatures while the lands remained in possession of the Indians, though possession could not be taken without their consent.
>
> * * * * *
>
> Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites; and their rights to it [ex]clusive enjoyment in their own way and for their own purposes were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals. * * * Such, too, was the view taken by this court of Indian rights in the case of *Johnson* v.

M'Intosh, 8 Wheat. 571, 604, which has received universal assent.

> The merits of this case do not make it necessary to inquire whether the Indians within the United States had any other rights of soil or jurisdiction; it is enough to consider it as a settled principle, that their right of occupancy is considered as sacred as the fee-simple of the whites. (5 Pet. 48.) (At pp. 745–747.)

In the leading case of *Choteau* v. *Molony,* 16 How. 203 (1853), this Court held that under the Spanish law applicable in the Louisiana Territory the possessory rights of the Fox Tribe of Indians in lands aboriginally occupied by them were such that any grants made by the Spanish Governor would be "subject to the rights of Indian occupancy. They would not take effect until that occupancy had ceased, and whilst it continued it was not in the power of the Spanish Governor to authorize anyone to interfere with it" (p. 239).

The same rule with respect to aboriginal possessory rights was reaffirmed by this Court in *Holden* v. *Joy,* 17 Wall. (84 U. S.) 211 (1872):

> Enough has already been remarked to show that the lands conveyed to the United States by the treaty were held by the Cherokees under their original title, acquired by immemorial possession, commencing ages before the New World was known to civilized man. Unmistakably their title was absolute, subject only to the pre-emption

> right of purchase acquired by the United States as the successors of Great Britain, and the right also on their part as such successors of the discoverer to prohibit the sale of the land to any other governments or their subjects, and to exclude all other governments from any interference in their affairs. (At p. 244.)

Of all the cases in which this Court has had occasion to consider the character of Indian occupancy rights, the case closest on its facts to the case at bar is *Buttz* v. *Northern Pacific Railroad,* 119 U. S. 55 (1886). There this Court ruled that where Congress granted public lands within a certain area to a railroad and some of the lands within this area were occupied by Indian tribes, the railroad took a title to these lands which was *subject to the right of Indian occupancy.*[5] The Court declared:

> * * * At the time the act of July 2d, 1864, was passed, the title of the Indian tribes was not extinguished. But that fact did not prevent the grant of Congress from operating to pass the fee of the land to the company. The fee was in the United States. The Indians had merely a right of occupancy, a right to use the land subject to the dominion and control of the govern-

[5] The result of this rule, in the case cited, was that when the United States did secure a relinquishment of title from these Indians, perfect title immediately vested in the railroad.

> ment. The grant conveyed the fee subject to this right of occupancy. The Railroad Company took the property with this incumbrance. The right of the Indians, it is true, could not be interfered with or determined except by the United States. * * * (At p. 66.)

The parallels between the *Buttz* case and the case at bar are many and persuasive. The language of the two grants is substantially identical.[6] In both cases the lands in question were former Spanish territory, in the one case acquired through the intermediate possession of France, in the other through the intermediate possession of

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[6]

Buttz Case	*Case at Bar*
Act of July 2, 1864 (13 Stat. 365)	*Act of July 27, 1866 (14 Stat. 292)*
The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the said Indians, the Indian titles to all lands falling under the operation of this act, and acquired in the donation to the [road] named in this bill. (Sec. 2.)	The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession, the Indian title to all lands falling under the operation of this act and acquired in the donation to the road named in the act. (Sec. 2.)

The only material difference between the phrasing of the two acts is that the act involved in the case at bar accorded the Indians the added protection embodied in the phrase "and only by their voluntary cession" as a qualification upon the undertaking of the United States to extinguish Indian title.

Mexico. The rule applied in the *Buttz* case to the protection of Indian aboriginal occupancy was a part, as the court below recognized (R. 206), of "the policy of maintaining just and peaceable relations with the Indians." Considerations of justice were no less applicable to the Walapai Tribe than to any other. Equally pertinent was the necessity or expediency of avoiding war, which, as judicial history records (*Luke* v. *United States*, 35 Ct. Cl. 15 (1899)), the Walapai Tribe was as capable, legally and physically, of waging as any other tribe. Any distinction between the *Buttz* case and the case at bar, therefore, would be irrelevant to the reasons for the rule in the former case and irrelevant to the essential facts of the latter case.

Another case paralleling the case at bar almost as closely as does the *Buttz* case is *Cramer* v. *United States*, 261 U. S. 219 (1923).

In that case, Congress had granted public lands to a railroad, and some of the lands within the area described in the grant were occupied by Indians, whose occupancy had never received affirmative governmental confirmation or recognition. This Court held that the lands so occupied were excluded from the railroad grant, and the United States, suing on behalf of the Indians, was held entitled to a decree canceling patents already issued to the railroad, with respect to the lands occupied by the Indians.

The railroad contended, in the *Cramer* case, that the rule safeguarding lands in aboriginal occupancy from the operation of a grant of public lands was not applicable to the case of individual Indians occupying rancherias. That contention was rejected by this Court. Now another railroad is presenting the opposite argument, that protection is given *only* to individual holdings and not to occupancy by tribes. This attempted distinction is without merit. This Court in the *Cramer* case declared:

> *Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United States; Beecher* v. *Wetherby,* 95 U. S. 517, 525; *Minnesota* v. *Hitchcock,* 185 U. S. 373, 385. *It is true that this policy has had in view the original nomadic tribal occupancy,* but it is likewise true that in its essential spirit it applies to individual Indian occupancy as well; and the reasons for maintaining it in the latter case would seem to be no less cogent, since such occupancy being of a fixed character lends support to another well-understood policy, namely, that of inducing the Indian to forsake his wandering habits and adopt those of civilized life. (At p. 227.) [Italics ours.]

The rule which this Court thus affirmed in the *Cramer* case was one which had its origin in cases

involving tribal occupancy and was *extended* to cases of individual occupancy. It has never been *restricted* to the latter situation.[7]

In *United States* v. *Shoshone Tribe,* 304 U. S. 111 (1938), the most recent decision of this Court on the character of Indian occupancy rights, the rule with respect to aboriginal possessory rights was reaffirmed in the following terms:

> Although the United States retained the fee, and the tribe's right of occupancy was incapable of alienation or of being held otherwise than in common, that right is as sacred and as securely safeguarded as is fee simple absolute title. *Cherokee Nation* v. *Georgia,* 5 Pet. 1, 48. *Worcester* v. *Georgia, supra,* 580. Subject to the conditions imposed by the treaty, the Shoshone Tribe had the right that has always been understood to belong to Indians, undisturbed

[7] The difference between the decisions in the *Buttz* and the *Cramer* cases is that in the former the railroad was held to have a good legal title subject to the Indian right of occupancy, while in the latter case, this court held that the Indians' occupancy right should be protected by canceling, *pro tanto*, the patent to the railroad. The reason for this difference is that in the *Buttz* case the Railroad Grant Act expressly provided for the donation of lands subject to an Indian right of occupancy which the United States undertook to extinguish, while in the *Cramer* case no such provision is found in the governing act. The legislation in the case at bar is, as noted, similar to that in the *Buttz* case. Therefore the petitioner has abandoned its attempt to secure cancelation of the patent to the respondent railroad and asks only that the railroad's title be declared subject to the occupancy right of the Walapai Tribe.

> possessors of the soil from time immemorial. (At p. 117.)

In other words, the existence of the treaty was not necessary to the existence of "the tribe's right of occupancy" in lands possessed "from time immemorial."

The foregoing eight leading cases[8] all purport to lay down a general rule, applicable throughout the territory of the United States to all the Indian tribes residing therein. This rule was not based upon peculiarities in the relations of the Federal Government to the various tribes respectively affected by these eight cases. In no case was prior affirmative recognition by the United States of possessory right held essential to establish the validity of that right. Indeed, in the *Cramer* case, this Court took special pains to point out that such prior recognition is not essential to the establishment of an Indian right of occupancy.

> The fact that such right of occupancy finds no recognition in any statute or other formal governmental action is not conclusive. The right, under the circumstances here disclosed, flows from a settled governmental policy. (At p. 229.)

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[8] Others to the same effect may be cited without further discussion. *Wilcox* v. *Jackson*, 13 Pet. 498 (1839); *Leavenworth, etc., R. R. Co.* v. *United States*, 92 U. S. 733 (1875); *Beecher* v. *Wetherby*, 95 U. S. 517 (1877); *Spalding* v. *Chandler*, 160 U. S. 394 (1896); *Minnesota* v. *Hitchcock*, 185 U. S. 373 (1902). And see authorities collected and discussed in Cohen, Handbook of Federal Indian Law (1941), 306–309.

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In none of the cases decided by this Court was recognition of Indian possessory rights by a prior sovereign held essential to the validity of such rights under the law of the United States.[9] In the *Cramer* case, the prior sovereigns were Spain and Mexico. In both the *Choteau* and *Buttz* cases, the prior sovereigns were Spain and France. In the *Mitchel* case the prior sovereigns were Great Britain and Spain. In *Worcester* v. *Georgia* and *Holden* v. *Joy* the prior sovereigns were Great Britain and Georgia. In the *McIntosh* case the prior sovereign was Great Britain. In the *Shoshone* case part of the land involved was derived from Spain and Mexico, another part from Spain and France, and a third part had not been subject to any prior

[9] There are two decisions of inferior courts which contain dicta pertinent to this issue. In *Hayt* v. *United States*, 38 Ct. Cl. 455 (1903), the opinion of the court contains some language which may be construed as asserting that Indian tribes had no occupancy rights within the Mexican Cession area, although a more reasonable construction of the court's language is that it asserts lack of such occupancy rights *in uninhabited areas*. The actual decision in the case is that the mention of an area in a treaty relinquishment did not prove that the area was subject to "the exclusive right of occupancy" of the relinquishing tribe so as to render any third party found in the area a trespasser, unable, as such, to recover for depredations committed upon his property. The more recent case of *United States* v. *Walker River Irr. Dist.*, 104 F. (2d) 334 (C. C. A. 9, 1939) rejected the claim that Indians of the Mexican Cession area were not entitled to the same water rights accorded to Indians elsewhere in the United States and commented, "They are no less wards of the nation than are the tribes living elsewhere." (At p. 337.)

European sovereignty. This Court did not consider that the diversified prior political history of the lands involved in the *Shoshone* case had any effect whatsoever upon the character of aboriginal occupancy which the tribe enjoyed under the law of the United States. In all these eight cases the right of occupancy considered was held to be essentially a right existing under the law of the United States, applicable anywhere within the territory of the United States, and not dependent upon the attitude of prior sovereignties.

In view of the generality[10] of the rule that actual possession from time immemorial gives rise to a right of occupancy valid against all parties other than the United States until terminated by the United States, the attempt of the courts below (R. 206–210) to distinguish away the *Buttz* case on the ground that it arose in the Louisiana Purchase area, while the case at bar arises in the Mexican Cession area, is wholly without justification in law or in fact. In so far as the purported distinction is derived from alleged peculiarities of Spanish law the distinction is entirely beside the point, for both territories were

[10] In the *McIntosh*, *Worcester*, and *Choteau* cases this Court pointed out that the recognition of aboriginal rights under United States law paralleled the recognition of such rights under the laws of Spain, France, and Great Britain and, as Chief Justice Marshall said, the principle was one "acknowledged by all Europeans" and part of "the common law of European sovereigns respecting America." *Worcester* v. *Georgia*, 6 Pet. 544, 545.

formerly under Spanish sovereignty, and in the case of the Louisiana Purchase area, only 20 days intervened between the occupancy of Spain and that of the United States (Binger Hermann, *The Louisiana Purchase* (1900) 34). The short-lived French sovereignty meant a difference only in the nationality of the officials responsible for Indian supervision, as stated in the *Chotcau* case (at p. 238), for the laws recognizing and protecting Indian occupancy were similar to those of Spain. Likewise, it has been shown that the policy objectives of justice and peace which underlay the rule of the *Buttz* case, were equally applicable to the case at bar. There is thus no rational ground whatever for holding that a different rule of aboriginal occupancy applies to the Mexican Cession area from that applicable to the Louisiana Purchase area and other parts of the United States.

C. This Court has consistently rejected repeated attempts to exclude Indians of the Mexican Cession area from the benefit of rules generally applicable outside that area for the protection of Indian rights.

The present is not the first attempt which has been made to deprive Indians in the Mexican Cession area of the benefit of general rules laid down by this Court for the protection of Indian rights. Similar attempts have been made on several prior occasions and on each occasion the at-

tempt has been frustrated by the decision of this Court.

The first such attempt sought to deprive the Pueblo Indians of New Mexico of the protection granted by the Indian intercourse laws which prohibit trespass upon, or improper negotiation for, Indian lands. This Court in *United States* v. *Joseph*, 94 U. S. 614 (1876), in line with decisions of the territorial courts of New Mexico,[11] held that the Pueblo Indians were not entitled to the protection of the Indian trade and intercourse laws, on the ground that Spanish and Mexican law had endowed these Indians with a peculiar status and that being "civilized" they were not "Indians" within the meaning of Federal statutes. This decision—the only one in which this Court, on the basis of alleged peculiarities of Mexican and Spanish law, has ever denied to an Indian group of the Mexican Cession area the protection elsewhere accorded to Indians of the United States—was subsequently discredited and finally overruled. In *United States* v. *Chavez*, 290 U. S. 357 (1933), this Court, *per* Vandevanter, *J.*, re-

[11] *United States* v. *Lucero*, 1 N. Mex. 422 (1869); *United States* v. *Santisteran*, 1 N. Mex. 583 (1876); *United States* v. *Varela, Koslowski, and Joseph*, 1 N. Mex. 593 (1874), *aff'd* 94 U. S. 614; *Pueblo of Nambe* v. *Romero*, 10 N. Mex. 58 (1900); *Territory of New Mexico* v. *Delinquent Tax List*, 12 N. Mex. 139 (1904); *United States* v. *Mares*, 14 N. Mex. 1 (1907).

ferring to *United States* v. *Sandoval,* 231 U. S. 28 (1913), commented:

> * * * We also there disapproved and declined to follow the decision in the early case of *United States* v. *Joseph,* 94 U. S. 614, relating to these Indians, because it was based upon reported data which in the meantime had been found to be at variance with recognized sources of information and with the long continued action of the legislative and executive departments. (At p. 363.)

The *Chavez* case and the *Candelaria* case[12] held, in opposition to the view of the *Joseph* case, that the Indian trade and intercourse laws applied to "civilized" Indians who had been citizens of Mexico, as well as to other Indians.

The second attempt to exclude Indians of the Mexican Cession area from the scope of general rules for the protection of Indians was made in the case of *United States* v. *Kagama,* 118 U. S. 375 (1886), involving the power of Congress to control crimes between Indians on the Hoopa Valley Reservation in the State of California. This Court, in upholding the constitutionality of this statute, rendered an opinion to which constant reference has since been made in discussions of Indian law. The following brief excerpts are pertinent to the case at bar:

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[12] 271 U. S. 432 (1926).

> The Indian Reservation in the case before us is land bought by the United States from Mexico by the treaty of Guadaloupe Hidalgo, and the whole of California, with the allegiance of its inhabitants, many of whom were Indians, was transferred by that Treaty to the United States. (At p. 381.)
>
> Following the policy of the European governments in the discovery of America towards the Indians who were found here, the colonies before the Revolution and the States and the United States since, have recognized in the Indians a possessory right to the soil over which they roamed and hunted and established occasional villages. * * * (At p. 381.)
>
> * * * Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen. (At pp. 383–384.)

Again, the attempt was made in *Cramer* v. *United States*, 261 U. S. 219 (1923), to persuade this Court that the rule recognizing aboriginal occupancy laid down in the *Buttz* case ought not

to be applied to certain California Indians residing within the area of the Mexican Cession. The argument, as already noted (pp. 24–25, *supra*), was rejected.

In *Lane* v. *Pueblo of Santa Rosa*, 249 U. S. 110 (1919), where a community of Papago Indians in Arizona sought to enjoin the Secretary of the Interior from disposing of lands aboriginally occupied by them, this Court held that the Indians concerned had the right to sue, and ordered a trial on the merits, rejecting the argument that because these Indians under Spanish and Mexican law had received no written documents of title they did not constitute "Pueblos" and had no capacity to bring suit to defend their land claims.

In *Pueblo of Santa Rosa* v. *Fall*, 273 U. S. 315 (1927), after the trial court had dismissed the suit of the Indians on the merits, this Court reversed that decision and directed that the dismissal of the suit, which was justified because the attorneys bringing the suit were not properly authorized, should be "without prejudice to the bringing of any other suit hereafter by and with the authority of the alleged Pueblo of Santa Rosa." (At p. 321.)

Even more important than the decision of this Court upholding the substantive rights of these Papago Indians of the Mexican Cession area, was the decision on the procedural aspect of the second *Santa Rosa* case. In holding that the contract

of the Indians with the attorneys bringing the suit was unlawful, this Court held that the unproved claim of these Papago Indians to lands aboriginally occupied was within the scope of the law requiring departmental approval for contracts by Indian tribes "relative to their lands" (R. S. § 2103), and also came within the protection of that provision of the Indian intercourse laws (R. S. § 2116) which prohibits conveyances not made by treaty.[13] This Court went on to declare: "These sections apply here whether the Indians concerned are to be classified as nomadic or Pueblo Indians." (At p. 320.) If aboriginal possession within the Mexican Cession area is thus protected by the provisions of the Indian intercourse laws against alienation and trespass, it has just as high a character of legal recognition as is enjoyed by aboriginal occupancy in any other area of the United States and just as high a character of legal recognition as is required for purposes of this suit.

In each of the foregoing cases this Court rejected the attempt to deprive Mexican Cession Indians or particular classes of such Indians of the protection generally accorded to Indians throughout the United States.

So, in the case at bar, the distinction, relied on by the court below, between the Walapai Indians and the tribes considered in the *Buttz* and similar

[13] See pp. 78, 79, *infra*.

cases is, petitioner submits, artificial and irrelevant to the issues in this case. It follows that the Walapai Indians are entitled to the protection which the Federal law, as interpreted by this Court, has accorded to Indians throughout the United States.

D. Federal legislation applicable to the Walapai Tribe as well as to other tribes protects the Indian right of occupancy based on aboriginal possession.

An unbroken course of legislation, dating from 1783, has conferred upon the historical fact of aboriginal occupancy the character of a Federal legal right or privilege, by affording legal protection to such occupany against various forms of trespass by parties other than the United States. The first enactment of the United States upon this subject antedates our Constitution. In 1783 the Congress of the Confederation prohibited all persons from making settlement on lands "inhabited or claimed by Indians" (8 Journals of Cong. (1783) (1800 ed.) 274). Again, in the Ordinance for the Northwest Territory the Congress of the Confederation provided that the land and property of the Indians

> shall never be taken from them without their consent; and in their property, rights, and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress * * * (1 Stat. 50, 52).

The first session of Congress to meet under the Constitution enacted the first Indian Trade and Intercourse Act, approved by President Washington on July 22, 1790 (1 Stat. 137). The protections against trespass upon Indian lands contained in this act, which was a temporary act, were substantially reenacted and amplified in the Indian Trade and Intercourse Acts of March 1, 1793 (1 Stat. 329); May 19, 1796 (1 Stat. 469); March 3, 1799 (1 Stat. 743); March 30, 1802 (2 Stat. 139) (the first permanent legislation in this field); and June 30, 1834 (4 Stat. 729) (Appendix I, A), which is in major part still in force as the backbone of present-day Federal Indian law.[14]

The Indian trade and intercourse laws dealt not only with trade, in the narrow sense, but with all intercourse between Indians and whites, and more particularly with the relation of the Indian tribes to the lands they occupied and to various types of intruders upon those lands.[15] As Chief Justice

[14] The development of these protections against trespass is traced in detail in Cohen, Handbook of Federal Indian Law (1941), 69–75, 306–307.

[15] The act of June 30, 1834 (4 Stat. 729), which is largely a reenactment of the earlier Indian trade and intercourse laws, prohibits, among other things: hunting and trapping in the Indian country (sec. 8); the driving of livestock "to range and feed on any land belonging to any Indian or Indian tribe, without the consent of such tribe" (sec. 9); the making of "a settlement on any lands belonging, secured, or granted by treaty with the United States to any Indian tribe" (sec. 11); and the introduction (sec. 20) or manufacture (sec. 21) of intoxicating liquor within the Indian coun-

Marshall declared in *Worcester* v. *Georgia*, 6 Pet. 515 (1832), these laws

> manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guarantied by the United States. (At p. 557.)

The force of the guarantees contained in the Indian trade and intercourse laws was not limited geographically but extended to every part of the territory of the United States. Within that territory they applied equally to lands contained in treaty reservations, to lands contained in other Indian reservations and to lands held by simple aboriginal occupancy. Whether or not the acquisition of the Mexican Cession area automatically brought these laws into operation, the laws were certainly extended to the Territory of New Mexico (including what is now Arizona) by section 17 of the act of September 9, 1850 (9 Stat. 446, 452), making effective within that area all laws of the United States not locally inapplicable, and by sec-

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try. The same law declared invalid every "purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians * * * unless the same be made by treaty or convention entered into pursuant to the constitution" (sec. 12). The President was empowered to use troops to protect the Indian country against trespass (sec. 23).

tion 7 of the act of February 27, 1851 (9 Stat. 574, 587) (Appendix I, D), which declared the Indian trade and intercourse laws to be in force in that territory.

This extension of the Indian trade and intercourse laws to the territory in which the Walapai Tribe lived guaranteed to all the Indian tribes of that area precisely the same legal status and the same possessory rights in land aboriginally occupied that were enjoyed by tribes outside of that area. (*United States* v. *Candelaria*, 271 U. S. 432, 441–442 (1926).) On February 27, 1851, when Congress expressly declared the Indian trade and intercourse laws to apply to the Territory of New Mexico, no grants of land had been made to any of the Indians of this area either by Executive order or by Federal statute or treaty. Only two tribes of this area had entered into treaties with the United States[16] and neither treaty contains any grant of territory to the Indian tribes from the United States. Indeed, both treaties, which were essentially treaties of peace between warring nations, recognize that the Indian tribes in question already possessed territory, and made provision for a future fixing of "their territorial boundaries."

When Indian lands in Arizona and New Mexico, in 1851, were protected against trespass, these lands

[16] Treaty with Navajo Tribe, September 9, 1849 (9 Stat. 974); Treaty with Utah Indians, December 30, 1849 (9 Stat. 984).

could not possibly have been restricted to formally established reservations, which did not exist, but must have included lands held by aboriginal possession, in which Indian title had not yet been either confirmed or extinguished. From and after February 27, 1851, if not before, the Indian trade and intercourse laws accorded to aboriginal occupancy in Arizona and New Mexico the same guarantees that had been accorded to aboriginal occupancy elsewhere in the United States. These guarantees conferred or recognized a possessory right.[17] This right was not the less valid against third parties because it was subject to termination by appropriate action of the Federal Government.

The foregoing course of legislation recognized and implemented the enforcement of Indian possessory rights inside as well as outside of the Mexican Cession area.

The court below referred to several statutes enacted since 1851 as a basis for denying the existence of aboriginal occupancy rights in the Mexican Cession area. The first of these statutes is the act of July 22, 1854 (10 Stat. 308) (Appendix I, E), termed by the court below "one of the most significant pieces of legislation by Congress in this connection" (R. 207). Section 7 of this act extended to the area section 10 of the Preemption Act of September 4, 1841 (5 Stat. 453) (Appendix I, B).

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[17] See Cohen, Handbook of Federal Indian Law (1941), 306.

and thereby prohibited the initiation of preemption rights on lands in New Mexico unless the Indian title was first extinguished, thus confirming the existence of rights of occupancy in the tribes of the Mexican Cession area.[18]

This is a sufficient answer to the contention (R. 67–68, 207–208) that the 1854 act, which offered donations of land in Arizona outside of reservations to white settlers, operated as a termination of all Indian title in Arizona outside of reservations. Furthermore, the act did not of itself terminate any rights at all, but merely authorized donations by the United States; and no rights of occupancy could be terminated until the land was actually donated to settlers. The railroad was not a settler and does not claim any donation rights.

Nor can it be validly contended that the 1854 act, if it did not actually deprive the Arizona Indians of any possessory rights, was at least evidence of a Congressional belief that they had no possessory rights. It is acknowledged by all that Congress has and has always had the constitutional power to extinguish Indian title with or without Indian consent. Therefore, even a direct offer by Congress of certain Indian lands to white settlers would not establish the absence of an Indian title therein. The fallacy of the respondent's argument is appar-

[18] Accord: Act of March 3, 1853 (10 Stat. 244), relating to public lands in California, which protects from settlement "any tract of land in the occupation or possession of any Indian tribe."

ent if it is applied to any other context. Congress at one time confiscated most of the property of the Mormon Church and the constitutionality of this legislation was upheld by this Court. *The Late Corporation of the Church of Jesus Christ of Latter-Day Saints* v. *United States*, 136 U. S. 1 (1890). This obviously did not mean that the Mormon Church never had any property rights or that other churches whose property has not been confiscated are without valid rights to the property in their possession. Similarly, the 1854 act, even if it authorized the Secretary of the Interior to donate Indian lands to white settlers, does not mean that the Indians had no property rights in the lands.

A second statute which was thought by the court below to reflect upon the occupancy rights of the Walapai Indians is the act of March 3, 1865 (13 Stat. 541, 559) (Appendix I, F). The court regarded the establishment of the Colorado River Reservation by this act as effectuating a termination of such Walapai occupancy rights outside of that reservation as may theretofore have existed (R. 208). Such an inference is wholly unwarranted. It is true that an Indian agent once claimed that he discussed with Walapai chiefs the establishment of this reservation, but on this very point the evidence on which respondent relies (R. 130–132) makes it clear that no binding agreement was ever consummated.[19] In fact, the whole gran-

[19] "* * * These Indians there assembled were willing, for a small amount of beef and flour, to have signed any

diose scheme of subjugating and irrigating 75,000 acres of irrigable land and concentrating thousands of diverse and mutually hostile Indians thereon collapsed completely when the difficulties and expenses involved in the scheme became apparent.[20] It was not until 1937 that Congress really began to appropriate the large sums necessary to irrigate this area.[21] It is now recognized as the exclusive

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treaty which it had been my pleasure to write. I simply proposed to them that for all the one hundred and twenty thousand square miles, full of mines and rich enough to pay the public debt of the United States, they should abandon that territory and confine themselves to the elbow in the Colorado river, not more than seventy-five thousand acres. But I did not enter into any obligation on account of the United States to furnish them with seeds and agricultural implements. I simply told them that if I was elected to represent that Territory in this Congress I would endeavor to lay their claims before the Government, which they understood to be magnanimous, and that I hoped that this Congress would have the generosity and the justice to provide for these Indians, who have been robbed of their lands and their means of subsistence, and that they may be allowed to live there where they have always made their homes." (Statement by Superintendent Poston, Congressional Globe 1320, March 2, 1865.)

A secondary reference to this proposal is contained in a statement by the Commissioner of Indian Affairs in his annual report for 1864. (W. P. 33.) This statement makes it clear that the proposal was merely a plan considered but not definitely accepted either by the Walapai Tribe or by the United States.

[20] See Appendix, pp. 13-14.

[21] Act of August 9, 1937 (50 Stat. 564, 580), $500,000; Act of May 9, 1938 (52 Stat. 291, 307), $700,000; Act of May 2, 1939 (53 Stat. 626, 633), $1,000,000; Act of May 10, 1939 (53

property of the Colorado River Indian Tribes of the Colorado River Reservation (a group that does not include any Walapai Indians) and of allottees, members of that group, and their heirs and assigns.[22]

Petitioner submits that no intent[23] and no agreement on the part of the Walapai Indians to abandon their lands and their homes can be deduced from a report of alleged Indian susceptibility to a vague and never-fulfilled campaign promise of an Indian agent running for Congress. An agreement for the surrender of lands "rich enough to pay the public debt of the United States" cannot reasonably be inferred from such a report. In *Blackfeet et al. Nations* v. *United States*, 81 Ct. Cl. 101 (1935), the court refused to derive an agreement of land cession from an unratified Indian treaty ceding lands, followed by an act of Congress and two Executive orders establishing a new reservation for the tribe in question. After referring to the failure of the act of Congress to mention the alleged agreement and to "the inherent difficulties of indulging inferences that Indian legislation resulted from the

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Stat. 685, 702), $1,500,000; Act of June 18, 1940 (54 Stat. 406, 437), $1,150,000; Act of June 28, 1941 (Public, No. 136, 77th Cong.), $560,000.

[22] Solicitor's Memorandum, Department of the Interior, September 15, 1936.

[23] On the essentials of such an intent see *New York Indians* v. *United States*, 170 U. S. 1 (1898).

preconceived validity by the Congress of an unratified treaty," the court said:

> * * * Aside from our opinion that unratified treaties, which expressly provide that they are to become effective only when ratified, are not binding, the court would hesitate to apply the doctrine of estoppel to tribal Indians, in the absence of positive proof that the tribe as such comprehended its rights and was accepting benefits from the Government with full knowledge of and in pursuance of rights created by treaties between the parties. * * * (At p. 130.)

The *Blackfeet* case at least involved an agreement that was actually carried out on both sides; in the case at bar there was neither an agreement nor a carrying out by either side of the terms upon which an agreement had been suggested: the United States did not complete the proposed irrigation project and the Walapai Indian Tribe did not move to the new reservation. If, as the court held, there was no binding agreement in the *Blackfeet* case *a fortiori* there was none in the case at bar. Finally, it is clear that as a matter of law the establishment of a reservation for certain Indians does not operate *ipso facto* to extinguish their rights in all other lands.[24]

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[24] *Blackfeet et al. Nations* v. *United States*, 81 Ct. Cl. 101, 124 (1935).

The establishment of reservations for various of the Rio Grande Pueblos has never been thought to operate as an extinguishment of their right to lands previously held. See

Thus, all of the collateral legislation prior to the act of July 27, 1866, is consistent with the view that Indian rights of occupancy existed, in the Mexican Cession area as elsewhere, until expressly terminated by affirmative action of the Federal Government. Most of this collateral legislation is inconsistent with the view that Indian rights of occupancy existed in that area only after an express grant of such rights by the Federal Government.[25] None of the collateral legislation repeals or modifies, expressly or by implication, the Indian intercourse laws which confer upon aboriginal occupancy in the Mexican Cession area the same legal protection that is due to aboriginal occupancy in other portions of the United States.

United States v. *Sandoval*, 231 U. S. 28, 39 (1913). And see the act of March 3, 1931 (46 Stat. 1509), authorizing the issuance of a patent to the Zuni Pueblo, based on rights under Spanish and Mexican law, pursuant to the act of July 22, 1854 (10 Stat. 308, 309). The lands in question, or part of them, were reserved "for the use and occupancy of the Zuni Pueblo Indians" in a series of Executive orders, of which the first is dated March 16, 1877. See Executive Orders Relating to Indian Reservations: 1855–1912 (1912), pp. 129–130. These Executive orders, Congress agreed, did not wipe out rights based on Spanish and Mexican law.

Even the Spanish law, upon which respondent relies so heavily to show absence of Indian right, expressly provided that the removal of Indians to a reservation should not operate to extinguish their possessory rights in the lands from which they removed. See Recopilacion, Law 9, Title 3, Book 6, cited at p. 47, *supra*.

[25] That such occupancy rights were not extinguished is confirmed by the act of February 23, 1865 (13 Stat. 432), authorizing the acquisition, by negotiation, of Indian possessory rights within the Territory of Utah.

E. Executive interpretation of the 1866 act and Executive action with respect to the lands of the Mexican Cession area confirm the existence of possessory rights in lands aboriginally occupied.

The uniform course of judicial decision and congressional legislation reviewed in the foregoing pages establishes rights which it was not within the power of administrative officials to abrogate even if they sought to do so. The heterogeneous collection of materials which has been injected into the record in this case (R. 29–145, 191–195) might be relevant if a need existed to resort to administrative interpretation and other extraneous aids for the resolution of statutory ambiguities. No such ambiguities have been shown in the statutes that govern this case. No attempt will therefore be made to deal in detail with this material. However, the contention of the court below that the Federal policy towards Indian occupancy rights in the Mexican Cession area was radically different from that in other parts of the country will be briefly considered. In doing so petitioner will pay special regard to three kinds of administrative material having a comparatively high value as evidence of national policy: (a) foreign treaties, (b) Indian treaties, and (c) regulations of executive departments.

The first formulation of Government policy towards the lands acquired under the treaty of Gua-

dalupe Hidalgo is found in the treaty itself (treaty of February 2, 1848, 9 Stat. 922, Appendix I, C), which guarantees protection to all Indian tribes with respect to their aboriginal homes and requires that special care shall be taken not to place the Indian occupants of the ceded area "under the necessity of seeking new homes" (Art. 11). This was a formal expression of Executive policy ratified by the Senate and constituting an international obligation toward a sister republic which had reason to fear the consequences to the inhabitants of its own territory if neighboring tribes in the area of the Cession should be torn loose from their aboriginal homes. The language of the treaty is the clearest possible expression of national policy and the subsequent legislation, which has already been traced, extending to the area of the Mexican Cession the protection granted in other parts of the United States to aboriginal occupancy was in fulfillment of the international obligation assumed by this treaty.

Again, a clear, specific, and formal recognition of Indian occupancy rights in the territory of the Mexican Cession is found in a series of Indian treaties executed with tribes of the Mexican Cession area during the two decades following the cession. Along the prospective right-of-way which might be secured by the respondent's predecessor under the act of July 27, 1866, those lands to which the United States had title were subject to the oc-

cupancy claims of various Indian tribes. Between the eastern terminal of the respondent's predecessor, in Missouri, and the Walapai country, in Arizona, aboriginal occupancy rights were asserted by seven major Indian tribes or nations. These were the Osage, Cheyenne, Arapaho, Kiowa, Comanche, Apache, Ute, and Navajo. Of these tribes the Apache, the Ute, and the Navajo claimed lands wholly or principally within former Mexican territory, and the Cheyenne, Arapaho, Kiowa, and Comanche claimed lands partly within former Mexican territory. The United States negotiated treaties with each of these seven tribes for the extinguishment of Indian title in the lands claimed.[28] Treaties with some of these tribes were already in effect when the act of July 27, 1866, was passed.

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[28] Treaty of July 1, 1852, with the Apache Nation, 10 Stat. 979; Treaty of February 18, 1861, with the Confederated Tribes of Arapaho and Cheyenne Indians of the Upper Arkansas River, 12 Stat. 1163; Treaty of October 7, 1863, with the Tabeguache Band of Utah Indians, 13 Stat. 673, 674; Treaty of September 29, 1865, with the Osage Nation, 14 Stat. 687, supplemented by section 12 of the act of July 15, 1870, 16 Stat. 335, 362; Treaty of October 14, 1865 (proclaimed on February 2, 1867), with the Cheyenne and Arrapahoe Tribes, 14 Stat. 703; Treaty of October 17, 1865, with the Apache, Cheyenne and Arrapahoe Tribes, 14 Stat. 713; Treaty of October 21, 1867, with the Kiowa, Comanche, and Apache Tribes, 15 Stat. 589; Treaty of March 2, 1868, with the Ute Indians, 15 Stat. 619, supplemented by agreement with the Ute Nation, dated September 13, 1873, ratified by the act of April 29, 1874, 18 Stat. 36, and agreement with the Ute Nation, dated March 6, 1880, ratified by the act of June 15, 1880, 21 Stat. 199; Treaty of June 1, 1868, with the Navajo Tribe, 15 Stat. 667.

Treaties with the Kiowa, Comanche, Apache, Navajo, and Ute were negotiated during the two years following the enactment of the 1866 act. Several of these treaties made specific reference to the contemplated building of railroads through country ceded or retained by the Indians, and secured the assent of the negotiating tribes to the building of railroads across reserved lands.[27]

In all the nine treaties entered into with these seven tribes there is no suggestion that the tribes which were relinquishing their rights, based on aboriginal occupancy, had nothing to relinquish because all or part of the lands covered by these treaties had been under Mexican sovereignty. One of the earliest treaties to be negotiated contains a precautionary proviso to the effect that the treaty was not to be construed as admitting in the Indians "any other or greater title or interest in the lands above excepted and reserved in said tribe or band of Indians than existed in them upon the acquisition of said territory from Mexico by the laws thereof."[28] The language of this pro-

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[27] See Article 3 of Treaty of October 7, 1863, with the Tabeguache Band of Utah Indians, 13 Stat. 673, 674; Article 11 of Treaty with the Osage Nation, 14 Stat. 687, 689; Article 14 of Treaty of March 2, 1868, with the Ute Indians, 15 Stat. 619, 622; Article 9 of Treaty of June 1, 1868, with the Navajo, 15 Stat. 667, 670.

[28] Treaty of October 7, 1863, with the Tabeguache Band of Utah Indians, 13 Stat. 673, 677.

Similar precautionary language was contained in certain treaties with various divisions of the Shoshone Nation who

viso assumed that they had some interest in these lands and sought to guard against the enlargement of that interest into a fee simple. This precautionary language does not appear in any of the other eight treaties cited.

So far, then, as the treaties of the United States set forth a national policy, they set forth a policy toward lands formerly under Mexican sovereignty no different from that applied to other lands, a policy strictly in conformity with the decisions and statutes cited in the foregoing sections of this brief.

If, as held by the courts below, the policy of protecting aboriginal occupancy that was applied outside of the Mexican Cession area was denied within that area, the regulations of the Indian Bureau ought to reveal this difference of treatment. Careful search, however, has failed to show any evidence whatever of any such cleavage. As a matter of fact, on June 15, 1865, only a year before the Railroad Grant Act, the superintendent of Indian Affairs for Arizona asked to be furnished with copies of laws affecting the Indians of Arizona. On August 28, 1865, the Com-

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occupied land a part of which came from Mexico. The Court of Claims and this Court, in holding that it constituted a recognition of the usual Indian title, made no distinction between the lands deraigned from Mexico and those obtained otherwise. *Shoshone Tribe of Indians* v. *United States*, 299 U. S. 476, 485 (1937); *United States* v. *Shoshone Tribe*, 304 U. S. 111, 113 (1938), aff'g 85 Ct. Cl. 331, 335.

missioner of Indian Affairs responded transmitting a copy of the general laws and regulations elsewhere applicable to the Indian Service [29] and advising the inquiring superintendent: "There are no laws especially applicable to the superintendency of Arizona." [30]

The foregoing materials indicate at least that in these various situations where the Executive branch of the Government gave formal expression to its policies with respect to occupancy rights of the tribes in the Mexican Cession area and the Walapai Tribe in particular, it dealt with those rights in the same terms that were applied to other tribes. Apart from this material a vast amount of administrative materials may be found in which Federal officials expressed general views on the validity of Indian occupancy rights or particular views, in the absence of one or both of the parties, as to the comparative rights of the Walapai Indians and the railroad. Such comments are interesting but unimportant. They may be cited on both sides of the present controversy. On behalf of the rule of uniformity which assigns to Indians in the Mexican Cession the same rights as other Indians enjoy there may be cited the statement of James Duane Doty,

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[29] Apparently the compilation submitted was one entitled "Laws, Regulations, etc., of the Indian Bureau (1850)."

[30] *Cf.* agreement set forth in Appendix, at p. 37, showing grant of permit by Walapai Tribe with administrative approval.

Superintendent for the Territory of Utah,[31] who, in a report dated September 12, 1862 (embodied in the report of the Commissioner of Indian Affairs for 1862), declared:

> Although the title was obtained by the treaty with Mexico, these Indians were then the occupants of every portion of this Territory, enjoying the same rights and privileges as the Indians east of the Mississippi river. The United States accepted of the cession, subject to all of the just rights of this third party then in the actual possession, but who was not a party to the treaty.

and the statement made by the Commissioner of Indian Affairs in his report for 1872, the year when respondent claims that its rights first attached to the lands here in suit:

> The executive and the legislative departments of the Government, however, have never recognized any distinction between the Indians living on territory ceded by Mexico and those upon territory ceded by Great Britain, France, or Spain. (At p. 82.)

On the other hand, statements by executive officers to a contrary effect may be found in an informal memorandum of the Solicitor of the Department of the Interior dated September 16,

[31] As bearing upon the weight to be given to Superintendent Doty's views, it may be noted that he had been a judge in the Territory of Wisconsin as well as Governor of that State and later served as Governor of the Territory of Utah.

1931, dealing with a part of the lands covered by the present suit, and in a letter written by Assistant Attorney General Richardson to the First Assistant Secretary of the Interior on November 12, 1931, expressing informal concurrence with the Solicitor's views but safeguarding his expression with the statement, "In conclusion, it is impossible to definitely state what the result of a court proceeding might eventually be."

If these various expressions pro and con are to be weighed against each other it should be noted that the Solicitor of the Interior Department and the Assistant Attorney General in 1931 had not had the benefit of a statement by the Walapai Tribe concerning its claims and that the supplied statement of facts furnished by the Assistant Commissioner of Indian Affairs has turned out to be erroneous in a number of essential respects.[32]

The issue before this Court is, of course, not the accuracy of any predications made by Solicitor Finney and Assistant Attorney General Richardson as to the probable outcome of this suit, but

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[32] Thus, Solicitor Finney assumed: "In fact, at the date of definite location, there were no Indians inhabiting this region of the county" (W. P. 324). And Assistant Attorney General Richardson made a similar assumption, based upon the erroneous advice of the Office of Indian Affairs that the entire Walapai Tribe was removed to the Colorado River Reservation in 1869 (W. P. 325). We now know that this was not the case, and that it was not before 1874, two years after the date of definite location of the railroad, that a minority of the tribe (and not the tribe as a whole) was removed tem-

rather the issue of whether the set of facts presented in the present complaint, a very different set of facts from that presented by the Assistant Commissioner of Indian Affairs in 1931, is sufficient to state a cause of action and to permit a proper consideration of the case upon a presentation of evidence by both sides.

The decision in *Cramer* v. *United States, supra,* where the lands in question had already been patented to the railroad and it was necessary to cancel the patents in order to protect the Indian right therein, shows that even if, in reliance upon the advice of Solicitor Finney and Assistant Attorney General Richardson, patents had been issued to the railroad for the lands within the reservation claimed by the railroad (which was never done), such an administrative decision would not now bar the relief that is here sought. Nor does the fact that patents were issued to the railroad for lands outside the reservation bar the relief now sought.

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porarily to the Colorado River Reservation. (See Appendix, pp. 45–50.) Assistant Attorney General Richardson likewise based his views on information that the Walapai Indians "did not, however, have any fixed homes, but were a wandering, warlike, hunting people that followed the herds of game" (*Ibid.*). A similar assumption as to the habits of the Walapais seems to have been made by Solicitor Finney (W. P. 324). We now know, and are prepared to prove (see Appendix, pp. 23–37), that the Walapai Indians did have fixed homes, did maintain permanent villages and rancherias, occupied a well-defined area noted on several contemporaneous maps, and were definitely not a "wandering, warlike, hunting people that followed the herds of game."

Except for the decision embodied in the present suit, asserting the superiority of the Indian claim, no considered decision has ever been made by the Executive branch of the Government as to the relative rights of the Walapai Tribe and the respondent railroad.

To accord to scattered, doubtful, and tentative expressions of opinion by administrative officials the force which has been granted to these expressions by the courts below is, petitioner submits, entirely unjustified. Even if the Government's officers actually believed that the Walapai had no right of use and occupancy in their country prior to the 1866 grant act, still the conclusion which the courts below drew does not follow. Far from administrative acts of this kind demonstrating of their own force that the Indians have no title, in many instances elsewhere when the rights of the Indians were directly brought into issue for judicial scrutiny such administrative acts have been held to be wrongful interferences with those rights. A prior, valid title of the Indians has been found to have existed notwithstanding that Presidential proclamation declared the lands part of the public domain and opened them to homestead entry;[31] or that Executive orders limited

[31] *New York Indians* v. *United States*, 170 U. S. 1, 4, 34 (1898), rev'g 30 Ct. Cl. 413 (1895), involving lands in Kansas which had earlier been set apart for the New York Indians, but which were proclaimed a part of the public domain and thrown open to settlement by Presidential proclamations of December 3 and 17, 1860.

their territory;[34] or that military reservations were established within the territory claimed by the Indians;[35] or that the Attorney General ruled in formal opinions[36] that Indians had no right in the timber on their lands;[37] or that the Secretary of the Interior[38] or Commissioner of Indian Affairs[39] ruled that the Indians did not possess

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[34] *Blackfeet et al. Nations* v. *United States*, 81 Ct. Cl. 101, 112, 130 (1935), wherein the treaty of 1855, which was held not to be affected by unratified treaties of 1865 and 1868, was disregarded by an Executive order of July 5, 1873 (1 Kappler 855), an act of Congress approved April 15, 1874 (18 Stat. 28), an Executive order of August 19, 1874 (1 Kappler 856), an Executive order of April 13, 1875 (1 Kappler 856), and an Executive order of July 13, 1880 (1 Kappler 856). Part of the lands ceded to the Indians by the treaty of 1855 were thrown open to settlement by act of Congress of April 15, 1874 (18 Stat. 28), and Executive order of August 19, 1874 (1 Kappler 856).

[35] *Fort Berthold Indians* v. *United States*, 71 Ct. Cl. 308, 328, 335 (1930); *Shoshone Indians* v. *United States*, 82 Ct. Cl. 23, 49 (1935). *Cf. Assiniboine Indian Tribe* v. *United States*, 77 Ct. Cl. 347, 354, 371 (1933), *app. dism.* 292 U. S. 606.

[36] 19 Op. Atty. Gen. 194 (1888); 19 Op. Atty. Gen. 710 (1890).

[37] It was held that the Indians had a right to the timber on tribal land, in *United States* v. *Shoshone Tribe*, 304 U. S. 111, 118 (1938), and *United States* v. *Klamath Indians*, 304 U. S. 119, 123 (1938). Thereupon Congress enacted a law to restore to the Chippewa Tribe timber sale proceeds which had been deposited in the United States Treasury pursuant to the opinions of the Attorney General above cited. Act of June 15, 1938 (52 Stat. 688).

[38] *New York Indians* v. *United States*, 170 U. S. 1, 31 (1898).

[39] The ruling of the Commissioner of Indian Affairs that certain tribes had no rights in their ancestral domain was proved wrong in *Fort Berthold Indians* v. *United States*, 71

the rights they claimed; or that Indians were placed on the reservation of other Indians by virtue of the use of the military force of the United States;[40] or that the lands of the Indians were patented to outsiders;[41] or that funds of the Indians derived from sale of their lands were deposited to the credit of the United States.[42]

Accordingly, although petitioner believes that a judicious analysis of administrative materials bearing upon the occupancy rights of the Walapai

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Ct. Cl. 308, 336 (1930). Likewise, in *Shoshone Tribe of Indians* v. *United States*, 299 U. S. 476, 494 (1937), rev'g 82 Ct. Cl. 23 (1935), although the Commissioner of Indian Affairs had held that Indians placed upon the reservation of another tribe had equal rights in the reservation with that other tribe, the court found that the original tribe had exclusive rights which it had not voluntarily yielded.

[40] In the Shoshone case, *supra*, note 39, the Arapaho Indians were moved into the reservation of the Shoshones under military escort, notwithstanding which the Shoshones were found to have been entitled to exclusive possession of the reservation.

[41] In the following cases, among others, the lands of the Indians were treated by the administrative offices of the Government as lands of the United States, through patenting of the lands to outsiders; in each instance, this administrative action was found to have been in derogation of the rights of the Indians: *Mille Lac Chippewas* v. *United States*, 229 U. S. 498, 506 (1913), rev'g 46 Ct. Cl. 424 (1911), and 47 Ct. Cl. 315 (1912); *New York Indians* v. *United States*, 170 U. S. 1, 4, 34 (1898), rev'g 30 Ct. Cl. 413 (1895); *Fort Berthold Indians* v. *United States*, 71 Ct. Cl. 308, 326, 337 (1930). *Cf. Assiniboine Indian Tribe* v. *United States*, 77 Ct. Cl. 347, 356, 371 (1933), app. dism. 292 U. S. 606; *United States* v. *Creek Nation*, 295 U. S. 103, 110 (1935), rev'g 77 Ct. Cl. 159 (1933).

[42] *New York Indians* v. *United States*, 170 U. S. 1, 4, 34 (1898), rev'g 30 Ct. Cl. 413 (1895).

Tribe and other tribes in Arizona and New Mexico will show a fairly consistent recognition of these rights in principle and doubts only as to the factual issue of their exact territorial extent, petitioner prefers to rest its argument on the broader ground that the rights of the Walapai Tribe, as of other tribes, are legal rights recognized by statute and confirmed by the consistent course of decisions of this Court, and that it has never been within the power of administrative officials to repeal these statutes, to reverse these decisions, or to abrogate these rights.

F. The view of Spanish and Mexican law adopted by the courts below and made the basis for excluding the Walapai Tribe from the scope of protection given other tribes is erroneous and has been so held by this Court.

Against the cumulative weight of the judicial, legislative, and executive authorities enumerated in the foregoing pages the opinion of the court below (R. 210) advances an argument based on two false premises: (a) that the occupancy rights of the Indians of the Mexican Cession area under United States law are to be measured by their rights under Spanish and Mexican law, and (b) that under Spanish and Mexican law the rights of Indian occupancy were inferior to those rights recognized under the law of the United States. It will, therefore, be necessary to examine these two assumptions.

The first of these premises is not supported by reason or authority. Notice has already been taken of the decisions of this Court in the *Cramer* case, the *Shoshone* case, the *Santa Rosa* cases, the *Kagama* case, and other cases in which protective rules generally applicable to Indians of the United States, including the rule protecting against trespass lands held by aboriginal occupancy, have been held applicable to Indians of the Mexican Cession area. It has been shown that while the United States did undertake, in various treaties, to respect all property rights enjoyed under prior sovereignties by the inhabitants of ceded areas, it never undertook to prevent such inhabitants from acquiring whatever new rights were allowed under the law of the United States generally to inhabitants of the United States. If, therefore, as the complaint in this case alleges, the Walapai Indians continued in possession of their ancestral homes after the treaty of Guadalupe Hidalgo, petitioner contends that the fact of possession, under the United States flag, had exactly the same legal significance as the possession of any other group of Indians in the territory of the United States. Under the view taken by petitioner, therefore, the law of Spain and Mexico is entirely irrelevant to this case and could become relevant only if these Indians claimed, which they do not, some special title under Spain or Mexico higher than the right of occupancy which is here asserted. Since Spanish and Mexican law cannot properly be invoked to *limit* the rights which the United

States accords to all Indians, petitioner submits that questions of Spanish and Mexican law are irrelevant to this case and that the decision below which, in departing from the *Buttz* case, is squarely based upon alleged peculiarities of Spanish and Mexican law, is therefore erroneous.

If, however, petitioner's contention that Spanish and Mexican law is irrelevant to this case be rejected as unsound, it then (and only then) becomes necessary to determine whether in truth the law of Spain and Mexico refused to Indian occupancy the character of legality which was accorded to Indian occupancy by the law of the United States. Petitioner submits that a careful examination of the original sources of Spanish and Mexican law will demonstrate that this law was at least as generous in its recognition of the legality of Indian aboriginal occupancy as the law of the United States. Indeed, the greatest experts on this subject have concluded that the law of the United States, recognizing the occupancy rights of Indian tribes, was derived from Spanish sources.[43]

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[43] See *Johnson* v. *McIntosh*, 8 Wheat. 543, 573 (1823); *Worcester* v. *Georgia*, 6 Pet. 515, 546 (1832). See the comment of James Brown Scott, former Solicitor for the Department of State, and President of the American Institute of Law, the American Society of International Law, and the Institut de Droit International: "* * * in the lectare of Vitoria on the Indians, and in his smaller tractate on War, we have before our very eyes, and at hand, a summary of the modern law of nations." The Spanish Origin of International Law (1928), 21. And note the characterization of Victoria [illegible] the Seventh Pan American Conference, December 23, 1933 [illegible] the man who "established the foundations of modern international law." Scott, The Catholic

This is not to say that the Spanish administrators were always scrupulous in according to the Indians under their protection the full measure of right which the law of Spain allowed.[44] Much misunderstanding has arisen from a failure to appreciate the wide gaps that often existed between Spanish law and Spanish administration, but it must in fairness be acknowledged that equally wide gaps have existed between the law of Indian affairs and the administration of Indian affairs in the United States. It was of the famous decision of this Court, delivered by Chief Justice Marshall, in the case of *Worcester* v. *Georgia,* 6 Pet. 515 (1832), that President Jackson was reported to have said, "John Marshall has made his decision; now let him enforce it."[45] and it is a matter of history that the "successful" plaintiff "liberated" by this Court continued to languish in a Georgia prison under a Georgia law declared unconstitutional by Supreme Court decision. The records of this Court show many cases

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Conception of International Law (1934), VII. And see footnotes 49 and 53, *infra.*

[44] Cyrus Thomas, in his introduction to volume 2 of Royce's Indian Land Cessions in the United States notes:

"Although the cruelty of the Spaniards in their treatment of the Indians during the conquest of Mexico and Central America is proverbial, yet an examination of the laws of Spain and ordinances of the King show that these acts were not only not warranted thereby, but in direct conflict therewith. * * *" (At p. 539.)

[45] Greeley, American Conflict (1864), Volume 1, page 106.

in which it has been held that the administration of Indian affairs failed to accord to the Indians concerned the full measure of their legal rights.[46] Administration is thus an inadequate yardstick for the measurement of Indian legal rights.

The law of Spain and Mexico as distinguished from the administrative practices of these sovereignties, recognized the national character of the Indian tribes, applied to these tribes the relations of war and peace applicable to other civilized or barbarian nations, and recognized the capacity of the Indians to hold property under laws and customs antedating the Spanish Conquest.

The first Spanish writer on the subject of Indian property rights was Franciscus de Victoria, who acted as legal adviser on Indian affairs to the Emperor of Spain. In 1532, called upon to advise on the rights of Spain in the New World,[47] Victoria, after considering in detail the argument that barbarians could not own land by reason of the sin of unbelief or other mortal sin, or by reason of "unsoundness of mind," reached the conclusion that

> the aborigines in question were true owners, before the Spaniards came among them,

[46] See footnotes 32–42, *supra*, and see Cohen, Handbook of Federal Indian Law (1941), 125.

[47] Victoria, De Indis et de Jure Belli Relectiones (1557) (Trans. by J. P. Bate, 1917). See Introduction by Nys, page 71 *et passim*. And see J. B. Scott, The Spanish Origin of International Law (1928), 19.

both from the public and the private point of view."

Since the Indians were "true owners," Victoria held, discovery could convey no title to their lands upon the Spaniards, for title by discovery can be justified only where property is ownerless.[48] Nor could Spanish title to Indian lands be validly based upon the divine rights of the Emperor or the Pope,[50] or upon the unbelief or sinfulness of the aborigines.[51] Thus, Victoria concluded, even the Pope had no right to partition the property of the Indians, and in the absence of a "just war" only the voluntary "consent of the majority" of an Indian nation or tribe could justify the annexation of its territory.[52]

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[48] Victoria, *op. cit.*, sec. 1, p. 128.

[49] *Ibid.*, sec. 2, p. 139. Accord: Grotius, Mare Liberum (1657), chapters 2, 5, quoted by Nys at p. 86, *op. cit.*

[50] Victoria, *op. cit.*, sec. 2, pp. 129–149.

[51] *Ibid.*, *sec.* 3, pp. 151–162.

[52] *Ibid.* It is worth noting, since the *ex cathedra* pronouncements of the Pope may be regarded as part of the early Spanish law (see Walton, The Civil Law in Spain and Spanish America (1900), 43–48), that Pope Paul III, in 1537, in accordance with the teachings of Victoria, declared:

"* * * that, notwithstanding whatever may have been or may be said to the contrary, the said Indians and all other people who may later be discovered by Christians, are by no means to be deprived of their liberty or the possession of their property, even though they be outside the faith of Jesus Christ; and that they may and should, freely and legitimately, enjoy their liberty and the possession of their property; nor should they be in any way enslaved; should

Victoria, however, recognized a distinction between jurisdiction and possession, and it was this distinction, confirmed by Grotius and Vattel,[53] that became, under the hand of Chief Justice Marshall, the guiding thread in our constitutional law respecting Indian possession. Exclusive jurisdiction over Indian territory might be acquired by discovery and papal grant, Victoria conceded, "because, if there was to be an indiscriminate inrush of Christians from other parts to the part in question, they might easily hinder one another and develop quarrels * * *."[54] This exclusive ju-

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the contrary happen, it shall be null and of no effect" (From the Papal Bull *Sublimis Deus*, translated in: F. A. MacNutt, Bartholomew de Las Casas: His Life, His Apostolate, and His Writings (1909), pp. 429, 431.)

The close parallelism of the Spanish view and the view adopted by the United States is apparent if one compares the foregoing passage with the language of Article 3 of the Northwest Ordinance, adopted by the Congress of the United States on July 13, 1787:

"The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights, and liberty they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall, from time to time, be made, for preventing wrongs being done to them, and for preserving peace and friendship with them."

[53] Victoria, *supra*, Introduction (Nys). See also Vattel, Le Droit des Gens (1758), vol. 1, bk. 1, ch. 18, sec. 209, and other authorities on international law cited by counsel for both parties in *Johnson* v. *McIntosh*, 8 Wheat. 543 (1823).

[54] Victoria, *op. cit.*, p. 157. *Accord: Johnson* v. *McIntosh*, *supra*, at 573; *Worcester* v. *Georgia*, *supra*, at 546.

risdiction would suffice to bar Indian intercourse with other nations.[55] But lordship in jurisdiction "* * * does not go so far as to warrant him [the Emperor] in converting provinces to his own use or in giving towns or even estates away at his pleasure."[56] Thus, Victoria concluded, "at the time of the Spaniards' first voyages to America they took with them no right to occupy the lands of the indigenous population."[57]

This doctrine was followed by Grotius, who insisted that discovery, in itself, did not confer upon the discoverers any rights of ownership unless consummated by actual occupancy of the lands claimed.[58] It was this distinction between jurisdiction and possession that Chief Justice Marshall emphasized when he declared, in the case of *Worcester* v. *Georgia,* that the claim of a European sovereign to

> the sole right of acquiring the soil and of making settlements on it * * * regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found

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[55] Victoria, *op. cit.*, p. 157.

[56] *Ibid.*, p. 134.

[57] *Ibid.*, p. 138.

[58] Grotius Mare Liberum (1657), chs. 2, 5. See Victoria, *op. cit.*, p. 86.

> that right on a denial of the right of the possessor to sell. (At p. 544.)

Thus, the attitude of Spanish law towards Indian land occupancy was not materially different from the doctrines laid down by this Court, which, while recognizing the *power* of the sovereign to extinguish Indian possessory rights, recognize at the same time that where the Indian right of use and occupancy has not been expressly and clearly terminated by law, such possessory rights remain valid against all third parties.

This view, first affirmed by Victoria, and reaffirmed by the writers on international law who were cited as authorities in early Federal litigation on Indian property rights,[59] underlies the Spanish legislation on the subject for a period of some three centuries. Throughout this period Spanish law recognized Indian property rights in land, anteceding Spanish sovereignty, as creating implied limitations upon Spanish grants.

Many provisions of this character are to be found in the Recopilacion de Leyes de Las Indias. Thus Book 4, Title 12, Law 9, declares:

> We command that the farms and lands which may be granted to Spaniards be so granted without prejudice to the Indians; and that such as may have been granted to their prejudice and injury be restored to whoever they of right shall belong.[60]

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[59] See fn. 53, *supra*.

[60] Law of June 11, 1594, Recopilacion de Leyes de Las Indias (1841, Madrid). Translation from White's New

This recognition of Indian possessory rights went so far that even where Indians were resettled in new areas, in accordance with the established policy of Spain,[61] Spanish law protected their possessory right in their former lands. Thus Law 9 of Title 3, of Book 6, declared:

> Whereas the Indians would sooner and more willingly be reduced into settlements, if they were allowed to retain the lands and improvements which they may possess in the districts from which they shall remove; we command that no alteration be made therein, and that the same be left to them, to be owned as before, in order that they may continue to cultivate them and to dispose of their produce.[62]

Included in the Recopilacion are laws requiring special proceedings to determine whether farms owned by Spaniards are located to the prejudice of the Indians, and requiring the removal of any such farms;[63] and requiring the King's

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Recopilacion of the Laws of Spain and the Indies (1839), vol. 2, p. 51. *Accord:* Book 4, Title 12, Law 18 (erroneously cited as Law 17 in White's New Recopilacion), Law of March 16, 1642, reaffirmed by Law of June 30, 1646, 2 White's New Recopilacion, p. 54.

[61] Recopilacion, Law 1, Title 3, Book 6, derived from act of March 21, 1551.

[62] Law of February 19, 1560, 2 White's New Recopilacion, p. 59.

[63] Book 2, Title 31, Law 13, Instruction to Viceroys, 1596, ch. 21.

attorney to appear on behalf of the Indians in all land cases, and in all cases involving land grants.[64]

In 1687, the King of Spain was grieved to find that white ranch owners

> are encroaching upon the lands of the latter (Indians), taking the same away from them, either by fraud or violence, by reason of the poor Indians abandoning their houses and settlements this being what the Spaniards long for and aim at, * * *.[65]

That injuries were, in fact, committed against Indians by Spaniards is clear, but the Spanish law required that such injuries should be punished more severely than injuries against Spaniards.[66]

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[64] Law of May 24, 1571, Book 2, Title 18, Law 36, 2 White's New Recopilacion, p. 34. Another law provided that where the suit was between the Indians and the Crown, a special attorney for the Indians should be appointed by the Court. Law 35, approved February 13, 1554.

[65] Royal Cedula, June 4, 1687, translated in Hall, Laws of Mexico (1885), p. 64.

[66] The Law of December 19, 1593, provides:

Ordenamos y mandamos que sean castigados con mayor rigor los espanoles que injuriaren, u ofendieren, o maltrataren a indios, que si los mismos delitos se cometiesen contra espanoles y los declaramos por delitos publicos.

(We ordain and command that Spaniards who injure or offend or maltreat Indians shall be punished with greater severity than if the same tortious acts had been committed against Spaniards, and we declare such acts to be public offenses.)

Spanish legislation provided a firm basis for prescription against the Crown.[87]

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[87] Law 4 of Title 8, of Book 11, of the Novisima Recopilacion, published in Madrid in the year 1805 (2 White's New Recopilacion, pp. 154–155), declared:

"Whereas some persons in our kingdoms hold and possess some cities, towns, and villages, and civil or criminal jurisdictions, without having for them either our title or that of the kings, our predecessors, and it is doubtful if the said persons could acquire against us and our crown for any time: We ordain and command that immemorial possession, proved according to, in conformity with, and with the qualities which the law of Toro requires, which is Law 1, Title 17, Book 10, that it may suffice to give title against us and our successors, to any cities, towns, or villages, or places, of civil or criminal jurisdiction, and any thing or part of it, with the things to the sovereignty and jurisdiction annexed and belonging, provided that the said time of said prescription shall not be interrupted nor changed by us or by our order, or otherwise in our natural or civil name.

"Law 1, Title 17, Book 10, to which the foregoing refers, is as follows:

"We order that the [mayorasgo] inheritance may be proved by the writing of the institution of it, with the writing of the [*licencia*] authorized officer of the king who gave it, the said writings being such as to entitle them to credit; or by witnesses who may depose which the law directs of the tenor of said writings, and likewise by immemorial custom, proved with the qualities which the said effects or inheritances derive from their previous possession. It is to know that the elder legitimate children and their descendants succeeded to the said effects by means of inheritance, in case the possessor of it shall have left other legitimate children, without giving them of what they succeed to in the said estate, any thing or equivalent for the succession in it; and that the witnesses be of good repute, and that they say that thus they saw them for the period of forty years, and thus they heard it said of their elders and ancestors, and thus

Again, we find included in a treaty between Spain and the Tallapuche Indians, dated June 1, 1784, a complete recognition of the right of the Indians to the lands that they hold "according to the right of property with which they possess them." (Art. 13.)[68]

No provision of the Spanish law governing Indian affairs has been found which would make Indian possessory rights dependent upon a royal grant. The whole theory of the Spanish law on this subject is that Indian property rights preceded the Spanish Conquest, and continued, except insofar as the Spanish Crown itself might terminate such rights. The fact that the Spanish Crown might terminate such rights, with or without compensation, does not disprove the existence of the right. The fact is that the Spanish Crown, by royal statute, might, and sometimes did, deprive Spaniards of their lands with equal impunity. In short, under Spanish law, the only lands in which no Indian right was recognized were lands which no Indians occupied.[69]

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they always saw and heard, and also that they never saw or heard say to the contrary, and that regarding it, it is the public voice and report and common opinion amongst the neighbours and inhabitants."

[68] 2 White's New Recopilacion, pp. 318, 321.

[69] Thomas' Introduction to Royce's Indian Land Cessions in the United States (1899), vol. 2, p. 539. Such unoccupied territory, Thomas observed, "was designated 'waste lands' and formed part of the royal domain."

If we turn from the original sources of Spanish law to the interpretations which have been placed upon that law by this Court in past cases, we shall find again an unbroken current of authority to the effect that Spain, no less than the United States, recognized aboriginal possession as legitimate, and as protected legally against all trespass until such time as the sovereign might see fit to terminate such possession. Thus, in the leading case of *Worcester* v. *Georgia, supra,* Chief Justice Marshall observed that Spain, like the United States, recognized aboriginal Indian occupancy as lawful and as creating a limited property right in the Indians, subject only to divestiture by the Government itself. That such rights of Indian occupancy did not depend for their validity upon any grant or charter is made abundantly clear in the decisions of this Court. As was said in *Choteau* v. *Molony,* 16 How. 203 (1853):

> Spain, at all times, or from a very early date, acknowledged the Indians' right of occupancy in these lands, but at no time were they permitted to sell them without the consent of the king. (At p. 229.)

The lands referred to in the *Choteau* case were lands ceded by Spain to France and by France to the United States. However, when these lands belonged to Spain they were subject to the Laws of the Indies, to the same extent and in the same way as the lands later ceded by Mexico.

It is true that this Court recognized a distinction between the lands considered in the *Choteau* case, which belonged to a Plains tribe, the Fox Indians, and such lands as might be claimed under pueblo grants. Lands under pueblo grant, the Court thought, might be sold with the approval of subordinate officials, while lands such as those held by the Fox Indians under aboriginal occupancy could be sold to third parties only with the governor's approval. The court explained:

> We are now speaking of Indian lands, such as these were, and not of those portions of land which were assigned to the Christian Indians for villages and residences, where the Indian occupancy had been abandoned by them, or where it had been yielded to the king by treaty. (At p. 237.)

That the aboriginal title of the Indians was recognized under Spanish law as involving a limited right of alienation, as well as a right of use, is made clear by the opinion of this Court in *Mitchel* v. *United States,* 9 Pet. 711 (1835), where it was said:

> The Indian right to the lands, as property, was not merely of possession; that of alienation was concomitant; both were equally secured, protected, and guaranteed by Great Britain and Spain, subject only to ratification and confirmation by the license, charter, or deed from the governor representing the king. Such purchases enabled the Indians

> to pay their debts, compensate for their depredations on the traders resident among them, to provide for their wants; while they were available to the purchasers as payment of the considerations which at their expense had been received by the Indians. It would have been a violation of the faith of the government to both, to encourage traders to settle in the province, to put themselves and property in the power of the Indians, to suffer the latter to contract debts, and when willing to pay them by the only means in their power, a cession of their lands, withhold an assent to the purchase, which, by their laws or municipal regulations, was necessary to vest a title. (At p. 759.)

An illuminating analysis of the Spanish law on aboriginal possession was made by this Court in *Carino* v. *Insular Government of Philippine Islands*, 212 U. S. 449 (1909). Remembering that the laws of the Indies applied equally to the East Indies and the West Indies, we can find little distinction between the claim of aboriginal occupancy upheld in that case and the claim considered in the case at bar. In the *Carino* case, this Court held that under Spanish law natives in possession of land were, in effect, owners, irrespective of Spanish royal grant, and observed that Spain, upon acquiring sovereignty over a country, did not thereby assume to convert all of the native inhabitants into trespassers or even into tenants at will.

The fundamental fact in the *Carino* case, as in the case at bar, is that long-continued possession—"one of the profoundest factors in human thought" (Holmes, *J.*, at p. 459), was never disturbed by the sovereign, who alone had power to disturb it, and continued to the date of the suit. The opinion of this Court, written by Mr. Justice Holmes, declared:

> If the applicant's case is to be tried by the law of Spain we do not discover such clear proof that it was bad by that law as to satisfy us that he does not own the land. To begin with, the older decrees and laws cited by the counsel for the plaintiff in error seem to indicate pretty clearly that the natives were recognized as owning some lands, irrespective of any royal grant. In other words, Spain did not assume to convert all the native inhabitants of the Philippines into trespassers or even into tenants at will. For instance, Book 4, Title 12, Law 14 of the Recopilacion de Leyes de las Indias, cited for a contrary conclusion in *Valenton* v. *Murciano*, 3 Philippine, 537, while it commands viceroys and others, when it seems proper, to call for the exhibition of grants, directs them to confirm those who hold by good grants or justa prescripcion. It is true that it begins by the characteristic assertion of feudal overlordship and the origin of all titles in the king or his predecessors. That was theory

and discourse. The fact was that titles were admitted to exist that owed nothing to the powers of Spain beyond this recognition in their books.

Prescription is mentioned again in the royal cedula of October 15, 1754, cited in 3 Philippine, 546: "Where such possessors shall not be able to produce title deeds, it shall be sufficient if they shall show that ancient possession, as a valid title by prescription." It may be that this means possession from before 1700, but at all events the principle is admitted. As prescription, even against crown lands, was recognized by the laws of Spain, we see no sufficient reason for hesitating to admit that it was recognized in the Philippines in regard to lands over which Spain had only a paper sovereignty. (At pp. 460–461.)

What has been said of Spanish law on the subject of Indian occupancy rights is applicable as well to the law of Mexico.[70] Except where amended or where inconsistent with Mexican independence, the laws of Spain remained in force under Mexican sovereignty,[71] in accordance with the usual rule of international law,[72] for Mexico as an independent state accorded certain new rights to In-

[70] 1 White's New Recopilacion, p. xi.

[71] Rockwell, Spanish and Mexican law (1851), pp. 17–18; Hall, Laws of Mexico (1885), secs. 85, 159.

[72] "* * * according to the established principles of the law of nations, the laws of a conquered or ceded country remain in force till altered by the new sovereignty." *Mitchel v. United States*, 9 Pet. 711, 748 (1835).

dians[73] but did not presume to deprive them of the rights of occupancy which the Spanish Crown had respected.[74] There is no suggestion in this case of any Mexican law, decree, or grant terminating Indian possession of the lands here in suit, just as there is no suggestion of any Spanish law, decree, or grant terminating that possession.

There is no suggestion in the record that any white man ever attempted to settle or otherwise interfere with Indian occupancy in the barren and inaccessible country of the Walapai during the entire period of Spanish and Mexican sovereignty. If, then, the Indians at the time of the Mexican Cession had no possessory rights in the lands they occupied, it must have been because the paper claim of the Spanish Crown to sovereignty over their territory *ipso facto* deprived all the Indians therein of all possessory rights in land and ren-

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[73] Thus under the "Plan of Iguala," adopted on February 24, 1821, and incorporated in the Mexican Declaration of Independence of October 6, 1821, it was provided that "all the inhabitants of New Spain, without distinction, whether Europeans, Africans, or Indians, are citizens of this monarchy, * * *" and further that "the person and property of every citizen will be respected and protected by the government." See *Territory* v. *Delinquent Tax List*, 12 N. M. 139, 76 Pac. 307 (1904) and sources cited.

[74] To the effect that under Mexican sovereignty "all those laws, which establish different regulations, according to the diversity of races, still remain in force, when they concede some rational and substantial favor, though not, when without reason, they subject any class to a distinction ridiculous and abhorrent," see *Sunol* v. *Hepburn*, 1 Cal. 255, 280 (1850), citing *Febrero Mejicano*, vol. 1, p. 97.

dered them trespassers, or at best tolerated intruders, in their own domain. The opinions of Chief Justice Marshall and of Justice Holmes, above quoted, demonstrate the unsoundness of any such doctrine.

Nevertheless this erroneous view of Spanish law has been earnestly argued by respondent, and the judgment order of the trial court appealed from incorporates (R. 192) the respondent's argument on this point, which is in turn quoted (R. 145—189) from a brief and testimony in another case, namely *Pueblo of Santa Rosa* v. *Fall*, discussed at pp. 34–35, *supra*. Significantly enough, although this brief and this testimony were accepted as a correct statement of the law of Spain and Mexico by the court to which they were originally addressed, the decision thus reached had to be reversed on appeal to this Court. In the case cited the Government argued that the Papago Indians who instituted that suit had no possessory right in any land, under Spanish and Mexican law, and that their suit to enjoin the Secretary of the Interior from interfering with such possessory rights should therefore be dismissed on the merits. In the course of this argument the claim was put forward that Indians under Spanish and Mexican law had no rights in land except such rights as were conferred by grant of the sovereigns. The Court of Appeals for the District of Columbia accepted this as a correct state-

ment of law, and ordered the suit dismissed on the merits. This decision was reversed on appeal to this Court. This Court took the position that the land in question (in which, according to the quoted brief, Indians had no recognizable interest), came within the protection of the Indian trade and intercourse laws, and particularly of the statutory restrictions against alienation of Indian lands, and that this was true "whether the Indians concerned are to be classified as nomadic or Pueblo Indians." (273 U. S. 315, 320.) Finding that the attorney bringing the suit had no authority to do so because his contract with the Indians had not been validly executed pursuant to the laws governing Indian land claims, this Court held that

> * * * the cause must be remanded to the court of first instance with directions to dismiss the bill, on the ground that the suit was brought by counsel without authority, but without prejudice to the bringing of any other suit hereafter by and with the authority of the alleged Pueblo of Santa Rosa. (At p. 321.)

The argument that Spanish and Mexican law recognized no Indian rights based on occupancy, which this Court rejected in 1927, has not acquired any validity in the years that have elapsed since that rejection.

Point 2

SUCH RIGHTS OF THE WALAPAI TRIBE AS EXISTED ON JULY 27, 1866, HAVE NOT BEEN EXTINGUISHED SINCE THAT DATE BY THE UNITED STATES OR ABANDONED BY THE WALAPAI TRIBE.

If it be true, as the courts below thought, that at the time of the grant to the railroad on July 27, 1866, the Walapai Indians had no possessory rights in the lands they occupied, there is, of course, no point in the question whether such possessory rights were subsequently extinguished. Various arguments have been advanced, however, in the briefs and opinions below to show that even if the Walapai Indians were entitled to rights of occupancy in the lands claimed, or part of them, as of July 27, 1866, these rights were subsequently extinguished. It is necessary to meet this contention.

Termination of Walapai possessory rights as to all or part of the land which this tribe held by aboriginal occupancy must have occurred, if it occurred at all, in one of two ways: either through voluntary abandonment on the part of the tribe or through extinguishment of Indian title by the Federal Government. As for the claim of voluntary abandonment, it is sufficient to note that the complaint in this case alleges, and evidence available for the trial of this case demonstrates, that the lands claimed in this suit were occupied continuously by the Walapai Tribe at all times relevant to the case and that there was thus no abandon-

ment of these lands by the Indians. Certainly, if there had been a voluntary abandonment of these lands by the Indians that would be a matter of proof on the part of the respondent and at the present stage of proceedings no such proof has been made.

We may therefore restrict our consideration for the present to the claim that Walapai occupancy rights have been extinguished by the Federal Government. Such extinguishment, if it occurred at all, must have occurred either through action of the Federal Government pursuant to the act of July 27, 1866, or through action superseding and modifying that act. Fortunately, the 1866 act describes with complete clarity the way in which Indian title existing in public-domain lands conveyed to the railroad was to be extinguished. It was to be extinguished (a) by the United States, (b) as rapidly as might be consistent with public policy and the welfare of the Indians, and (c) only by the voluntary cession of the Indians themselves. These criteria were well understood and administratively practicable. We have already noted a series of treaties and agreements by which relinquishments of Indian possessory rights along the proposed right-of-way of respondent's predecessor were effected.[75]

By such a treaty ratified by the Senate, or by such an agreement ratified by Congress, the United

[75] See footnote 26, *supra*.

States might have extinguished the aboriginal title of the Walapai Tribe, in accordance with the criteria of the 1866 act, as to all or any part of the Walapai country. Constitutionally, the United States may still enter into such a formal agreement, or even a treaty. That would be the simple and natural way of carrying out the commitments made in the 1866 act. On the other hand, if the United States failed to secure a cession of Indian lands on reasonable terms, the course of eminent domain was always open, and remains open, even though the legislative authorization of such a course might amount to a repeal or modification of the 1866 act. (*Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U. S. 641 (1890).)

With these alternatives before the Federal Government, the course of its action after 1866 may be examined to determine whether or not it legally extinguished Walapai possessory rights in all or any part of the lands here in litigation.

A. The 1870 act appointing a Surveyor General for Arizona did not extinguish the occupancy rights here asserted.

In the first place, an attempt has been made to read the language of extinguishment or forfeiture into a provision in the appropriation act of July 15, 1870 (16 Stat. 291, 304) (Appendix I, H), providing for the appointment of a Surveyor General for Arizona charged with the investigation of Spanish and Mexican land titles. It

is no doubt true that the Surveyor General did not consider claims based upon Indian rights of occupancy that antedated Mexican or Spanish sovereignty. This proves nothing at all. The Surveyor General was not directed to define the boundaries of Indian country. Rather, he undertook the narrower task of verifying titles originating under Spanish or Mexican grants, and his conclusions are therefore irrelevant to a question of Indian occupancy not based upon such a grant. See *Cramer* v. *United States*, 261 U. S. 219, 231 (1923). But even if he had tried to examine into the scope and extent of Indian occupancy rights, the fact that he never made a report on the Walapai would not show that the Walapai had no such rights. The Surveyor General of New Mexico under similar legislation reported on various Pueblo claims under alleged Spanish grants. He did not include in his list the claims of the Pueblos of Santa Ana and Zuni, but this did not prevent Congress in 1869 from recognizing the validity of the title claimed by the former pueblo[76] or, in 1931, that of the latter.[77] Nor did these omissions by the Surveyor General prevent administrative recognition and protection of the lands of these two pueblos prior to such congressional confirmation.

The legislation setting up the offices of Surveyor General for Arizona and New Mexico did not in

[76] Act of February 9, 1869 (15 Stat. 438).

[77] Act of March 3, 1931 (46 Stat. 1509).

terms cut off any Indian occupancy rights and was not intended to do so. In this, the legislation must be distinguished from the act setting up a court of private land claims for California (act of March 3, 1851, 9 Stat. 631), which specifically referred to Indian claims (sec. 16) and declared invalid all claims derived from the Spanish or Mexican Government not presented within two years and all claims not confirmed by that court (sec. 13). *Barker* v. *Harvey*, 181 U. S. 481 (1901). The legislation designed to scrutinize land claims in Arizona and New Mexico was similar to that which covered land claims in Louisiana Territory. Section 2 of act of March 2, 1805 (2 Stat. 324, 325). The decisions of this Court in *Choteau* v. *Molony*, 16 How. 203 (1853); *Buttz* v. *Northern Pacific Railroad*, 119 U. S. 55 (1886); and *United States* v. *Shoshone Tribe*, 304 U. S. 111 (1938), make it clear that the act of 1805 did not destroy all Indian titles in the Louisiana Territory. No more did the 1870 act destroy all Indian titles in Arizona.

It is clear that the 1870 act appointing a Surveyor General for Arizona, and the action taken thereunder, did not amount to an extinguishment of land title with Indian consent in the manner prescribed by the act of July 27, 1866. It is equally clear that it did not amount to an amendment or repeal by implication of the 1866 act. It follows, therefore, that the 1870 legislation left intact whatever rights of possession existed in the Walapai Tribe on July 27, 1866.

B. The temporary removal in 1874 of part of the Walapai Tribe to the Colorado River Reservation did not extinguish the possessory rights here asserted.

Again, the court below has maintained (R. 211) that the forcible removal of the Walapai Indians to the Colorado River Reservation in 1874 amounted to an extinguishment of Indian title. The court, in its opinion, declares:

> In 1874 the Walapai were forcibly taken to their reservation. There could not be a more effective denial of the possessory rights of the Walapai to lands outside their reservation than this act of forcible expulsion from such lands by executive action in accordance with the act of Congress creating the reservation (R. 211).

This argument is based upon an erroneous view of the facts and of the law. In the first place the fact is that only 580 out of approximately 1,500 Walapai Indians were ever actually removed to the Colorado River Reservation.[78] The complaint alleges (R. 5, 8, 9, 15, 16, 18), and evidence available for introduction at the trial demonstrates,[79] that lands claimed in this suit outside the area of the Colorado River Reservation were continuously occupied at all times material to the case, including the year 1874, by Walapai Indians. In the second place, as a matter of law, it is well established that

[78] See Appendix, pp. 45–50.

[79] See Appendix, pp. 42–44.

forcible removal does not extinguish Indian rights of occupancy. *Fort Berthold Indians* v. *United States*, 71 Ct. Cl. 308 (1930).[80] The doctrine that forcible removal of individuals of a particular race to concentration camps results legally in a loss of possessory rights in land has no place in the law of a civilized nation. This Court has held that the exercise of military force against Indians is not the true measure of their legal rights. *Shoshone Tribe* v. *United States*, 299 U. S. 476 (1937); *United States* v. *Shoshone Tribe*, 304 U. S. 111 (1938). If, under the law of the United States, the Walapai Tribe had rights to occupy certain lands, then the Army could not, by temporarily confining some Walapai Indians in what amounted to a military concentration camp, take those rights away, and the rights continued to exist despite anything the Army did.

Certainly, the forcible removal of 580 Walapai Indians to the Colorado River Reservation in 1874 was entirely deprived of any significance, even minute, as a denial of the right of occupancy, when in 1875 (Walapai Papers, 104, 108), these Indians fled from that reservation and the civil

[80] In the case of *New York Indians* v. *United States*, 170 U. S. 1 (1898), this Court, in rejecting the contention that Indian occupancy rights in a certain area had been "abandoned" by refusal of the Indians to settle within the area, declared: "To create an abandonment there must not only be an omission to prosecute, but an intent to forego, of which there is no evidence in this case." (At p. 35.)

and military authorities agreed not to order their return.[81]

Here, too, it is clear that the action of the Federal Government in 1874 neither amounted to an extinguishment of Indian title with Indian consent in the manner prescribed by the act of July 27, 1866, nor constituted a modification or repeal of that legislation.

C. The establishment of an Executive order reservation for the Walapai Indians in 1883 did not extinguish the possessory rights here asserted.

A further argument has been made that the establishment of the Walapai Reservation in 1883 amounted to an extinguishment of Indian rights in lands outside the reservation. In so far as this argument relies upon the assumption that the Walapai Reservation as actually established was accepted by the Walapai Indians as a *quid pro quo* for the relinquishment of all other possessory rights, the argument is not supported by any evidence. No evidence has been put forward to demonstrate that any Walapai Indians moved, or agreed to move, on to the Executive order reservation. The complaint alleges (R. 15, 16, 18), and evidence is available to prove,[82] that lands outside of the 1883 reservation were continuously and exclusively occupied by the Walapai Indians from

[81] See Appendix, pp. 46–50.

[82] See Appendix, pp. 34–36, 39–50.

before 1883 to the time of the institution of this suit.

As a legal matter, the argument that the establishment of the 1883 reservation extinguished possessory rights elsewhere is subject to the same infirmity that has been noted above in considering the parallel argument that the establishment of the Colorado River Reservation necessarily extinguished Indian occupancy rights elsewhere.

Finally it should be noted that if this argument were valid it would show only a relinquishment of possessory rights *outside* of the reservation boundaries. That would not justify the decision of the courts below, which, in effect, declares that Indian possessory rights within the reservation boundaries, in the lands claimed by the railroad, have been extinguished.

Once more, it is plain that this administrative action was neither an extinguishment of Indian title with Indian consent in the manner prescribed by the act of July 27, 1866, nor a modification of that act.

D. The 1925 Exchange Act did not extinguish the possessory rights here asserted.

It is contended (R. 211) that Walapai occupancy rights were denied or extinguished by the act of February 20, 1925 (43 Stat. 954) (Appendix I, I), which authorized exchanges of Indian land for non-Indian land within the reserva-

tion boundaries. This argument, if valid at all, would apply only to lands within the reservation and not to lands outside; therefore, if this were the only valid argument for the extinguishment of Indian possessory rights, it would be insufficient to sustain the ruling of the courts below. However, the argument itself is without force.

The act of February 20, 1925, does not show a denial of Indian occupancy right in any particular tract, notwithstanding the contrary reasoning of the court below (R. 211–212). That act authorized the Secretary of the Interior to "accept reconveyances to the Government of privately owned and State school lands and relinquishments of any valid filings, under the homestead laws, or of other valid claims within the Walapai Indian Reservation * * *." The strongest implication that can be read into the 1925 act is that there is *some* land within the boundaries of the reservation that does not belong to the Indians. But this statute cannot be used to show that any particular tract does not belong to the Indians. Much less can it be used to show that all of the reservation lands here in dispute belong to the railroad.

The act of February 20, 1925, did not constitute an extinguishment of Indian title with Indian consent pursuant to the method prescribed by the act of July 27, 1866; and this act obviously was neither amended nor repealed by the 1925 act.

E. The possessory rights here asserted have not been terminated by the petitioner and cannot be terminated by the respondent.

The record of legislation reviewed above indicates that Congress never did terminate the possessory rights of these Indians either by securing their voluntary cession of the lands in question, as prescribed by the act of July 27, 1866, or by expressly or impliedly repealing or amending the 1866 act.

To accomplish an extinguishment of the right of occupancy claimed in this case a statute terminating the right in unmistakable and express terms would have to be found. Congress acts habitually upon Indian land matters in express language, and that is especially true when a forfeiture of right is involved. The Walapai Indians should not, and Congress did not intend that they should, lose their rights to occupy the land by mere logomachy, nor by an intricate process of statutory construction and implication.[83] The extinction of right must appear clearly. 34 Op. Atty. Gen. 171, 172. *Cf. Leavenworth, Lawrence and Galveston R. Co.* v. *United States,* 92 U. S. 733, 740 (1875). No statute, no governmental action

[83] In the case of *New York Indians* v. *United States*, 170 U. S. 1 (1898), this Court, in rejecting the argument that the plaintiff Indians had abandoned certain lands, declared: "A condition, when relied upon to work a forfeiture, is construed with great strictness." (At p. 25.) Accord: *Holden* v. *Joy*, 17 Wall. (84 U. S.) 211 (1872).

of any nature, in express terms or otherwise, has destroyed the rights of the Walapai Tribe. On the contrary, there have been repeated evidences of recognition of the occupancy rights of Walapai and other tribes of the Mexican Cession area, by Congress, by the Executive, and by the railroad itself.[54] An example of Congressional recognition of occupancy rights within former Mexican territory is the act of March 3, 1891 (26 Stat. 854), establishing a court of private land claims to determine land claims in former Mexican territory, including the Territory of Arizona, which provides:

> No claim shall be allowed that shall interfere with or overthrow any just and unextinguished Indian title or right to any land or place. (At p. 860.)

Again, a disclaimer by the State of Utah to any lands held by Indians is contained in the act of July 16, 1894 (28 Stat. 107). New Mexico and Arizona likewise were required to disclaim jurisdiction over lands held by Indians or Indian tribes,

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[54] See pp. 36–46, 47–58, *supra*. Indeed the A. & P. Railroad Co., the predecessor of the defendant railroad, recognized that there were outstanding Indian occupancy titles along its proposed route, and that railroad used the existence of Indian occupancy rights in an effort to have this Court determine the act of July 6, 1886 (24 Stat. 123), declaring a forfeiture of a portion of the A. & P. grant void and ineffectual because the United States had failed to perform its promise to extinguish the Indian titles to the lands along the route of the railroad. *Atlantic and Pacific Railroad* v. *Mingus*, 165 U. S. 413 (1897).

"until the title of such Indian or Indian tribes shall have been extinguished." (Act of June 20, 1910, secs. 2, 20, 36 Stat. 557, 569–571; and see Ariz. Const., Art. XX, sec. 4.)

Finally, it may be noted that large sums of money have been appropriated by Congress in performance of the guardianship duty of the Government towards the Walapai Indians (Walapai Papers, 357–359), signifying "a settled purpose to fix the Indians in their country, by giving them security at home." (*Worcester* v. *Georgia,* 6 Pet. 515, 557 (1832).)

A review of the statutes since the Grant Act of 1866 compels the conclusion that the possessory rights enjoyed by the Walapai Tribe prior to the 1866 grant act, and safeguarded by that act, were not destroyed by subsequent legislation, but were consistently safeguarded and preserved.

Point 3

THE UNITED STATES AND THE WALAPAI TRIBE HAVE BEEN DEPRIVED OF A RIGHT TO TRIAL UPON ISSUES OF FACT, THROUGH A MISAPPLICATION OF THE DOCTRINE OF JUDICIAL NOTICE.

The contention of the respondent, argued in its motion to dismiss the complaint (see pp. 6–8, *supra*), that the lands in litigation belonged to the railroad as a matter of "public record and common knowledge" (R. 25) was supported by the following assertions, among others, in its Memorandum of Points and Authorities:

> The Walapai were disunited bands of nonagricultural, nomadic savages who occupied exclusively no definable territory and no place or places for any great length of time (R. 30).
>
> The Walapai have surrendered any claims they may once have asserted inconsistent with defendant's title (R. 71).

If the first of the quoted statements is factually true, and the Walapai Indians were not a tribe and had no permanent territory of their own (as distinguished from lands wandered over by many tribes), then, of course, the petitioner cannot hope to prevail in a suit which is entirely based upon the assertion of continuous possession by the Walapai Tribe of described areas.

Equally, if the second of these statements is factually true, petitioner cannot hope to prevail.

There is no dispute as to the applicable rule of law if either or both of the foregoing factual propositions, incorporated in respondent's motion to dismiss, be true.

The second of the propositions is expressly set forth in the opinion of the Circuit Court below as a ground of its holding (R. 211). The former of these propositions is implicit in that opinion as an alternative ground. That opinion concedes that even within the Mexican Cession area Indians enjoy possessory rights in "exceptional instances as in case of the lands of Pueblo Indians" (R. 206). Presumably the court had in mind such

cases as *Cramer* v. *United States*, 261 U. S. 219 (1923); *Lane* v. *Pueblo of Santa Rosa*, 249 U. S. 110 (1919); and *Pueblo of Santa Rosa* v. *Fall*, 273 U. S. 315 (1927), in which the Indians sought to show not simply the usual nomadic occupancy but rather the maintenance of homes, improvements, or agricultural settlements. In dismissing these "exceptional cases" as irrelevant to the case at bar, the Circuit Court assumed the truth of the assertions made by the respondent in its motion to dismiss and incorporated in the opinion of the District Court to the effect that the Walapai Tribe did not maintain permanent homes, improvements, and settlements. If, as petitioner contends, the courts below were mistaken in their factual assumptions as to the character of Walapai occupancy, then even if the courts below were legally correct in drawing a distinction between various kinds of occupancy, the application of that distinction against the Walapai Tribe would be factually unjustified and constitute a misapplication of the doctrine of judicial notice since the facts on this issue were not before the court.

The propositions quoted go to the heart of the pending litigation. Undoubtedly some evidence advanced by the respondent makes these assertions plausible, if the evidence to the contrary is not considered. Such evidence as tends to indicate that the Walapai Indians were not a tribe, that the tribe did not continuously occupy the lands

herein claimed and that the (nonexistent) tribe voluntarily abandoned the tribal claims here asserted was carefully marshalled by the respondent (R. 30–32, 71). The court below seems to have assumed that since all this evidence was found in Government files or printed in a Government document (Walapai Papers, printed by Government Printing Office, 1936), it should take judicial notice of its truth, as well as its existence, and on the basis of such judicial notice should conclude that the allegations in the complaint of continuous possession of the lands in question by the Walapai Indians are obviously false and should be disregarded, thus rendering the complaint inadequate to state a cause of action.

Petitioner respectfully submits that by this interesting but unprecedented procedure the United States and the Walapai Indians have been deprived of a fair trial.

Petitioner does not question the right of the courts below to notice the existence of the various reports of officials and travelers which they have noticed.

Petitioner does, however, protest that the proper scope of judicial notice is exceeded *if assertions in documents judicially noticed are taken to be proved, beyond all possibility of contradiction by countervailing evidence, merely because these assertions are contained in documents attached to a motion to dismiss a complaint instead of being*

offered in evidence during a trial, after issue joined.

The probative force of the evidence collected by the defendant and made the basis of "findings" by the District Court is, to speak moderately, very slight. While the Walapai Indians did not perhaps attain the complete political unity achieved by some other tribes, they had enough unity to merit and receive continued recognition as a tribe by the political arm of the Federal Government whose determinations in such matters are accepted by the courts as conclusive. *United States* v. *Sandoval*, 231 U. S. 28 (1913); *United States* v. *Holliday*, 3 Wall. 407 (1865). The only evidence put forward to prove that the Walapai had no permanent home is a miscellaneous collection of reports of explorers and soldiers who, at various times, found Walapai Indians in various areas and occasionally reported that the Indians they found ate wild foods and dressed in skins, and a further collection of reports of "Seviches," Yavapai, and Apaches sighted within the Walapai Country. If such evidence were presented at the trial of this case, the United States would be prepared to show that the Walapai Indians did inhabit all of the various areas in which explorers found them, and inhabited these various areas not successively but simultaneously, that the so-called "Seviches" were Walapai Indians, that the Yavapai or Apaches found in the Walapai country were either peaceful visitors or raiders, but in neither case claim-

ants of possessory rights therein, and that neither the supplementing of crops by wild foods nor the wearing of furs is incompatible with permanent occupancy of defined areas of land. The United States might further have shown that some of the evidence put forward by the defendant comes from prejudiced or untrustworthy sources. At least there is room for some reasonable doubt as to the objectivity and accuracy of the reports of alleged Indian backwardness that emanate from an official who is advocating the "extermination" of one of the larger tribes under his jurisdiction and feels impelled to add: "I have no objection to seeing them burnt alive, men, women, and children."[85] Under the procedure adopted by the District Court, however, the Government was denied the benefit of all safeguards attending a trial that assure scrutiny of the source and probative force of evidence.

Finally, even if the petitioner were required to prove something more than the usual nomadic tribal occupancy, in the case at bar evidence (including expert testimony, Indian evidence of ancient and continued possession of described areas, and the presentation of documentary materials not thus far presented) is available to show that the Walapai Indians were peaceable, industrious people who engaged in irrigation farming

[85] Letter of Superintendent of Indian Affairs for Arizona, Charles D. Poston, to his successor in office, George W. Leihy, dated April 12, 1865.

long before the white settlers came into the country, who, except on the rare occasions when they were interrupted by troops that burned their homes and destroyed their fields and possessions, maintained permanent villages, settlements, and rancherias with well-recognized ownership rights applied to land and improvements, and who from time immemorial have lived and died in the places where their parents lived and died, to a much greater extent than has been the case with their white neighbors."[36]

Petitioner did not ask the courts below and does not ask this Court to accept these conclusions as facts to be judicially noticed. It asks only for an opportunity to prove these facts by the usual method of a trial, which thus far it has not had, and which, if issues of fact are to be resolved under the theory of judicial notice embraced below, it never can have.

Again, under the theory that judicial notice may be used to reverse the normal rule that factual allegations of a complaint are assumed to be true on a motion to dismiss, the District Court accepted the defendant's contention that the Walapai Indians had "surrendered any claims they may once have asserted inconsistent with defendant's title" (R. 71, 192–195). The only evidence put forward in support of this contention (R. 69) is: (1) a campaign promise by an Arizona Indian agent

[36] See Appendix, pp. 23–37.

unning for Congress that he would, if elected, 'endeavor to lay their claims before the Government," which was followed by an unsuccessful plea in Congress for a large appropriation to provide for irrigating 75,000 acres of land for the Walapai and other Indians and (2) a statement by the Commissioner of Indian Affairs (R. 69, W. P. 33) that he recommended proposing to the Indians a "compromise" by which "on their confining themselves to their reservation" (which they never did) "and yielding all claims to lands beyond it" (which, likewise, they never did), "they shall, in lieu of an annuity in money or supplies, be furnished by the Government with an irrigation canal, at a cost estimated at something near $100,000 which, by insuring them their annual crops, will enable them to support themselves, independently of other aid by the Government" (which the Government never did). A campaign promise of glittering generality and a proposal for an agreement not accepted by either party may be evidence of a sort; but it is carrying the doctrine of judicial notice a long way out of its proper scope to characterize this evidence, put forward to establish a voluntary cession of the lands in suit, as irrebuttable and to deny the petitioner an opportunity to offer countervailing evidence showing that the Walapai Indians never did surrender their possessory rights but persistently, so far as it was within their power to do

so, pressed the claims which the United States after long study and long delay now asserts on their behalf.[87]

The argument of the respondent is not aided simply by the fact that Government officials expressed opinions unfavorable to Walapai occupancy of the lands in suit. There are some questions as to which the fact that responsible Government officials make certain reports is relevant, regardless of the truth of the reports, as for instance upon the constitutional question of whether the legislature may have had a reasonable basis for supposing that certain social conditions existed when it passed a given law. So it may be with other exceptional questions affecting constitutionality or jurisdiction. But the question of actual possession in this case is not of that character. Here the complaint alleges that the Walapai Tribe has at all material times held continuous possession (R. 4, 8, 9, 15, 16) of the lands described, and the courts below have reversed the normal rule that allegations of fact in a complaint are deemed true on demurrer and have concluded that contrary statements about the habits and intentions of these Indians made by various officials in documents attached to a motion to dismiss are to be deemed true and made the basis for adjudicating the issue against the Indians finally, and

[87] See Appendix, pp. 46–50.

bsolutely, and without a trial. Petitioner insists hat the truth of any report or opinion on Walai habits, movements, and possessions is properly ubject to proof, and that petitioner is entitled to day in court on these issues. As this Court said, er Cardozo, *J.*, in the case of *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio*, 301 U. S. 292 (1937),

> * * * notice, even when taken, has no other effect than to relieve one of the parties to a controversy of the burden of resorting to the usual forms of evidence. Wigmore, Evidence, sec. 2567; 1 Greenleaf, Evidence, 16th ed., p. 18. "It does not mean that the opponent is prevented from disputing the matter by evidence if he believes it disputable." *Ibid.* Cf. *Skapleigh* v. *Mier*, 299 U. S. 468. Such at least is the general rule, to be adhered to in the absence of exceptional conditions. * * * Even so, to press the doctrine of judicial notice to the extent attempted in this case and to do that retroactively after the case had been submitted, would be to turn the doctrine into a pretext for dispensing with a trial. (At pp. 301–302.)

What Mr. Justice Cardozo pointed to as the vice of the lower court decision in the *Ohio Bell Telephone* case was—

> * * * that even now we do not know the particular or evidential facts of which

> the Commission took judicial notice and on which it rested its conclusion. Not only are the facts unknown; there is no way to find them out. (At p. 302.)

That, indeed, is the situation in the case at bar. Petitioner does not know to this day what facts the courts below took notice of when they concluded (R. 195–196, 212) that no possible evidence that petitioner might produce would show the kind of settled possession that would, even on the theory of law advanced by respondent (R. 174), give rise to possessory rights. Even the respondent and the courts below admit (R. 206–207) that there are some situations in which continuous possession, as alleged in the complaint (R. 4, 8, 9, 15, 16), does create possessory rights in former Mexican territory. But what kind of possession the petitioner would have to show under this view—whether it would be necessary to show the existence of farms, villages, or irrigation ditches, how continuous and how long such possession would have to be—all these matters are left in the realm of mystery by the use of "judicial notice" to cover a mixture of law, fact, and hearsay evidence.

Petitioner, believing that the truth of allegations of continuous and exclusive occupancy of the lands claimed is a proper subject of trial and proof, has not attempted to try its case in briefs and will not at this stage of litigation make such an attempt.

However, it does undertake to submit in an appendix to this brief, for the consideration of this Court, in the event that this Court shall consider the factual issues pertinent, sample evidentiary materials, designed to show:

(a) That the evidence of which the District Court purported to take judicial notice is incomplete with respect to issues of fact that the District Court purported to decide on the basis of judicial notice.

(b) That evidence not before the District Court tends to show the falsity of the two propositions relied upon as a basis for the motion to dismiss and the order granting that motion, to wit:

> The Walapai were disunited bands of non-agricultural, nomadic savages who occupied exclusively no definable territory and no place or places for any great length of time. (R. 30.)
>
> The Walapai have surrendered any claims they may once have asserted inconsistent with defendant's title. (R. 71.)

Upon the basis of the material thus assembled, petitioner submits that it is entitled to a day in court to present completely evidence, of which the materials assembled in the attached Appendix are only a sample or token, showing that the Walapai Indians did in fact maintain continuous and exclusive possession of the area here in litigation, or

at least of many tracts of land within that area, and never surrendered, or agreed to surrender, that possession.

Respectfully submitted.

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The Solicitor General authorizes the filing of this brief.

CHARLES FAHY,
Acting Solicitor General.

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